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May 1

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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS

AT THE OCTOBER TERM, 1897, AND THE MARCH TERM, 1898,
OF THE FIRST DISTRICT

WITH A
TABLE OF THE CASES
REPORTED IN
VOLUMES 1 TO 75, INCLUSIVE, OF THE APPELLATE COURT REPORTS

WHICH HAVE BEEN REVIEWED BY THE SUPREME COURT ON APPEAL OR
WRIT OF ERROR, SHOWING THE DISPOSITION OF EACH CASE BY
SUCH COURT, WHETHER AFFIRMED, MODIFIED, DIS-
MISSED OR REVERSED, WITH REFERENCES
TO THE REPORTS OF EACH COURT,
SHOWING WHERE SUCH
CASES MAY BE
FOUND

VOL. LXXVI

REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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CALLAGHAN & COMPANY
1898

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CORRECTED TO OCTOBER 15, 1898.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—CARROLL C. BOGGS.....Fairfield.
Second District—JESSE J. PHILLIPS.....Hillsboro.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—JOSEPH N. CARTER.....Quincy.
Fifth District—ALFRED M. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Phillips is the present Chief Justice.

CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.
JACOB O. CHANCE, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL, Springfield.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

FRANCIS ADAMS, Ashland Block, Chicago.

NATHANIEL C. SEARS, Ashland Block, Chicago.

THOMAS G. WINDES, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

JUSTICES.

HENRY M. SHEPARD, Ashland Block, Chicago.

HENRY V. FREEMAN, Ashland Block, Chicago.

OLIVER H. HORTON, Ashland Block, Chicago.

APPELLATE COURT,

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa.

JUSTICES.

JOHN D. CRABTREE, Dixon.

DORRANCE DIBELL, Joliet.

FRANCIS M. WRIGHT, Urbana.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

JUSTICES.

OLIVER A. HARKER, Carbondale.

BENJAMIN R. BURROUGHS, Edwardsville.

JOHN J. GLENN, Monmouth.†

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 508, Laws of 1897, 185.

† Resigned, October 7th, 1898.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-
days in February and August.

CLERK—Frank W. Havill, Mount Vernon.

JUSTICES.

JAMES A. CREIGHTON, Springfield.
NICHOLAS E. WORTHINGTON, Peoria.
HIRAM BIGELOW, Galva.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seven-
teen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope,
Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBARTS, Cairo.
OLIVER A. HARKER, Carbondale.
ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton,
Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and
Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.
PRINCE A. PEARCE, Carmi.
ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison,
Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville,
MARTIN W. SCHAEFFER, Belleville.
WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Ef-
fingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.
TRUMAN E. AMES, Shelbyville.
SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumber-
land and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.
FERDINAND BOOKWALTER, Danville.
FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Ma-
con, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana.
EDWARD P. VAIL, Decatur.
WILLIAM G. COCHRAN, Sullivan.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THOMAS M. SHAW, Lacon.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit and Superior Courts of said county. The Criminal Court of Cook County is also established with jurisdiction of a Circuit Court in criminal cases only. The judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

| | |
|---------------------|----------------------|
| EDWARD F. DUNNE, | JOHN GIBBONS, |
| MURRAY F. TULEY, | RICHARD W. CLIFFORD, |
| RICHARD S. TUTHILL, | THOMAS G. WINDES, |
| FRANCIS ADAMS, | EDMUND W. BURKE, |
| ARBA N. WATERMAN, | CHARLES G. NEELY, |
| ELBRIDGE HANECY, | FRANK BAKER, |
| OLIVER H. HORTON, | ABNER SMITH. |

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

| | |
|--------------------|---------------------|
| HENRY M. SHEPARD, | ARTHUR H. CHETLAIN, |
| THEODORE BRENTANO, | HENRY V. FREEMAN, |
| PHILIP STEIN, | JOHN BARTON PAYNE, |
| WILLIAM G. EWING, | NATHANIEL C. SEARS, |
| JONAS HUTCHINSON, | FARLIN Q. BALL, |
| GEORGE A. TRUDE.* | JOSEPH E. GARY. |

*Appointed to fill vacancy May 3, 1898.

(5) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 50,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate.

| JUDGES. | COUNTIES. | COUNTY SEATS. |
|--------------------------|------------------|----------------|
| CARL E. EPLER..... | Adams..... | Quincy. |
| WM. S. DEWEY..... | Alexander..... | Cairo. |
| JOSEPH STORY..... | Bond..... | Greenville. |
| WALES W. WOOD..... | Boone..... | Belvidere. |
| R. E. VANDEVENTER..... | Brown | Mt. Sterling. |
| RICHARD M. SKINNER..... | Bureau..... | Princeton. |
| ANDREW J. EMERICK | Calhoun | Hardin. |
| ALVA F. WINGERT | Carroll..... | Mt. Carroll. |
| HENRY PHILLIPS..... | Cass | Virginia. |
| CALVIN C. STALEY..... | Champaign | Urbana. |
| LYMAN G. GRUNDY..... | Christian..... | Taylorville. |
| WM. T. HOLLENBECK..... | Clark..... | Marshall. |
| BEN HAGLE..... | Clay | Louisville. |
| JOSEPH HANKE..... | Clinton | Carlyle. |
| S. S. ANDERSON | Coles..... | Charleston. |
| ORRIN N. CARTER (C)..... | Cook | Chicago. |
| C. C. KOHLSAAT (P)..... | Cook..... | Chicago. |
| JOHN C. EAGLETON..... | Crawford | Robinson. |
| GESHAM MONOHON..... | Cumberland..... | Toledo. |
| WILLIAM L. POND..... | DeKalb | Sycamore. |
| GEO. K. INGHAM | DeWitt | Clinton. |
| WM. H. BASSETT..... | Douglas..... | Tuscola. |
| JOHN H. BATTEN..... | DuPage..... | Wheaton. |
| ERASMUS G. ROSE | Edgar | Paris. |
| WM. MCGREGOR..... | Edwards..... | Albion. |
| WM. B. WRIGHT | Effingham | Effingham. |
| GEO. T. TURNER..... | Fayette..... | Vandalia. |
| ALEXANDER MCELROY..... | Ford..... | Paxton. |
| W. F. DILLON..... | Franklin | Benton. |
| GILBERT L. MILLER..... | Fulton | Lewistown. |
| D. M. KINSALL..... | Gallatin | Shawneetown. |
| JOHN C. BOWMAN..... | Greene..... | Carrollton. |
| A. R. JORDON..... | Grundy | Morris. |
| SAML. M. WRIGHT..... | Hamilton..... | McLeansboro. |
| DAVID E. MACK | Hancock..... | Carthage. |
| WM. J. HALL | Hardin..... | Elizabethtown. |
| RANSELDON COOPER | Henderson | Oquawka. |
| A. R. MOCK..... | Henry | Cambridge. |
| C. W. RAYMOND..... | Iroquois..... | Watseka. |
| ROBT. MCELVAIN.... | Jackson..... | Murphysboro. |
| H. M. KASSERMAN..... | Jasper | Newton. |
| ROBT. M. FARTHING..... | Jefferson..... | Mt. Vernon. |
| ALLEN M. SLATTEN..... | Jersey | Jerseyville. |
| WM. T. HODSON..... | Jo Daviess | Galena. |
| O. R. MORGAN..... | Johnson..... | Vienna. |
| M. O. SOUTHWORTH..... | Kane | Geneva. |
| EBEN B. GOWER..... | Kankakee..... | Kankakee. |
| HENRY S. HUDSON..... | Kendall..... | Yorkville. |
| PATRICK H. SANFORD..... | Knox | Galesburg. |
| DEWITT L. JONES..... | Lake | Waukegan. |

| JUDGES. | COUNTIES. | COUNTY SEATS. |
|---------------------------|------------------|----------------|
| HENRY W. JOHNSON (C)..... | LaSalle | Ottawa. |
| ALBERT T. LARDIN (P)..... | LaSalle | Ottawa. |
| AMOS N. GOODMAN..... | Lawrence | Lawrenceville. |
| RICHARD S. FARRAND..... | Lee | Dixon. |
| CHAS. M. BARICKMAN..... | Livingston | Pontiac. |
| L. C. SCHWERDTFEGGER..... | Logan..... | Lincoln. |
| WM. L. HAMMER..... | Macon | Decatur. |
| H. H. COWEN..... | Macoupin | Carlinville. |
| WM. P. EARLY..... | Madison..... | Edwardsville. |
| CHAS. F. PATTERSON..... | Marion | Salem. |
| E. D. RICHMOND..... | Marshall | Lacon. |
| JAMES A. MCCOMAS..... | Mason..... | Havana. |
| GEORGE SAWYER..... | Massac..... | Metropolis. |
| W. W. MELOAN..... | McDonough..... | Macomb. |
| ORSON H. GILLMORE..... | McHenry..... | Woodstock. |
| ROLAND A. RUSSELL..... | McLean | Bloomington. |
| HENRY H. HOAGLAND..... | Menard | Petersburg. |
| JAMES H. CONNELL..... | Mercer..... | Aledo. |
| PAUL C. BREY..... | Monroe | Waterloo. |
| GEO. R. COOPER..... | Montgomery | Hillsboro. |
| CHARLES A. BARNES..... | Morgan | Jacksonville. |
| ISAAC HUDSON... .. | Moultrie | Sullivan. |
| JOHN D. CAMPBELL..... | Ogle | Oregon. |
| ROBERT H. LOVETT (C)..... | Peoria | Peoria. |
| JOSEPH W. MAPLE (P)..... | Peoria | Peoria. |
| R. W. S. WHEATLEY..... | Perry | Pinckneyville. |
| F. M. SHONKWILER..... | Piatt..... | Monticello. |
| WM. B. GRIMES..... | Pike | Pittsfield. |
| DAVID G. THOMPSON..... | Pope | Golconda. |
| JOHN D. BRISTOW..... | Pulaski..... | Mound City. |
| JOHN M. McNABB..... | Putnam..... | Hennepin. |
| SAMUEL L. TAYLOR..... | Randolph..... | Chester. |
| T. W. HUTCHISON..... | Richland..... | Olney. |
| LUCIAN ADAMS..... | Rock Island..... | Rock Island. |
| ALBERT W. LEWIS..... | Saline..... | Harrisburg. |
| CHARLES P. KANE..... | Sangamon | Springfield. |
| D. L. MOURNING..... | Schuyler..... | Rushville. |
| JAMES CALLANS..... | Scott..... | Winchester. |
| WM. H. RAGAN..... | Shelby | Shelbyville. |
| WM. W. WRIGHT..... | Stark | Toulon. |
| EDWARD C. ROADS..... | St. Clair..... | Belleville. |
| JAMES H. STEARNS..... | Stephenson..... | Freeport. |
| W. R. CURRAN..... | Tazewell | Pekin. |
| MONROE C. CRAWFORD..... | Union | Jonesboro. |
| M. W. THOMPSON..... | Vermilion | Danville. |
| ROBERT BELL..... | Wabash..... | Mt. Carmel. |
| T. G. PEACOCK..... | Warren | Monmouth. |
| GEO. VERNOR..... | Washington..... | Nashville. |
| WM. T. BONHAM..... | Wayne..... | Fairfield. |
| JAMES C. PEARCE..... | White..... | Carmi. |
| HENRY C. WARD..... | Whiteside..... | Morrison. |
| ALBERT O. MARSHALL..... | Will..... | Joliet. |
| W. F. SLATTER..... | Williamson | Marion. |
| RUFUS C. BAILEY..... | Winnebago..... | Rockford. |
| A. M. CAVAN..... | Woodford..... | Eureka. |

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FIRST DISTRICT—MARCH TERM, 1898.

Nannie M. Coleman et al. v. Margaret Keenan.

1. APPELLATE COURT PRACTICE—*Time for Filing Records—Sec. 72 of the Practice Act Construed.*—Authenticated copies of judgments, orders and decrees appealed from, shall be filed in the office of the clerk of the Appellate Court, on or before the second day of the succeeding term: *Provided*, twenty days shall have intervened between the last day of the term at which the judgment, order or decree appealed from was entered and the sitting of the court to which the appeal is taken; but if ten days and not twenty shall have intervened, then such record must be filed on or before the tenth day of such succeeding term, otherwise the appeal will be dismissed, unless further time is granted by the court. (Sec. 72, Practice Act.)

2. SAME—*Construction of the Statute.*—The statute (Chap. 110, Sec. 72, R. S.) is so plain as to leave no room for construction. Ten full days must intervene between the last day of the term at which the judgment was rendered and the sitting of the court to which the appeal is taken. The first day of the session of the Appellate Court must be excluded in the computation of the ten days.

3. SAME—*When the Record Need Not be Filed at the Succeeding Term.*—An appeal was taken from a judgment rendered by the Circuit Court of Cook County, at the January term, 1898, of which term Saturday, February 19th, was the last secular day, and March 1st the first day of the term of the Appellate Court, to which the appeal was taken. It was held that the appellant was not required by said section 72 to file the transcript of the record at the succeeding (March) term of the Appellate Court.

4. WORDS AND PHRASES—*To "Intervene," as Used in Sec. 72 of the Practice Act.*—To intervene means to come between; and when it is said that a day must intervene between two other days, the meaning is, that

it must come between and must fully elapse between the two days mentioned.

5. **TIME**—*Computation, etc.*—If an act is to be done between two certain days, it must be performed before the commencement of the latter day. Both days must be excluded.

6. **TERM OF COURT**—*Under Sec. 72 of the Practice Act.*—For most purposes a term of court is considered as one day; but for the purposes of Sec. 72 of the Practice Act, it is made to consist of days, and the word, therein, is used in its popular sense.

7. **SAME**—*Sunday, When a Day of the Term.*—The fact that Sunday is not a judicial day does not, within the contemplation of the statute, render it any less a day of a term of court, and applies as much to a Sunday next succeeding the last secular day of the term as to any preceding Sunday of the term.

Motion to Dismiss, on a short record. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Made in this court at the March term, 1898. Overruled. Opinion filed March 28, 1898.

No appearance by appellant.

THOMAS W. PRINDEVILLE, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is a motion to dismiss the appeal on short record for failure of appellant to file a transcript of the record.

It appears from the short record that the judgment appealed from was rendered January 25th, at the January term, 1898, of the Circuit Court. The first day of the February term of the court was February 21, 1898. The first day of the present or March term of this court was March 1, 1898. The statute prescribing the time of filing records in this court is section 72 of the Practice Act, and is as follows:

“Sec. 72. Authenticated copies of records of judgments, orders and decrees appealed from, shall be filed in the office of the clerk of the Supreme Court, or of the Appellate Court, as the case may be, on or before the second day of the succeeding term of said courts: *Provided*, twenty (20) days shall have intervened between the last day of the term

at which the judgment, order or decree appealed from shall have been entered and the sitting of the court to which the appeal shall be taken; but if ten (10) days and not twenty (20) shall have intervened as aforesaid, then the record shall be filed as aforesaid on or before the tenth (10th) day of said succeeding term, otherwise the said appeal shall be dismissed, unless further time to file the same shall have been granted by the court to which said appeal shall have been taken upon good cause shown."

Saturday, February 19th, was the last secular day of the January term of the Circuit Court, and Sunday, February 20th, intervened between that day and the first day of the February term. Excluding Sunday, February 20th, and assuming Saturday, February 19th, to have been the last day of the January term of the Circuit Court, and also excluding from the computation of time March 1st, the first day of the March term of this court, only nine days intervened between February 19th and March 1st. To intervene means to come between; and when it is said that a day must intervene between two other days, the meaning can not be otherwise than that it must come between the two days mentioned—that it must fully elapse between the two days mentioned. A body can not possibly intervene or come between two other bodies, and at the same time occupy wholly or partially the space occupied by either of the other bodies. The error of the proposition that, in computing the ten days which must intervene between the last day of the term at which the judgment was rendered and the first day of the term of this court, such first day is to be included, is demonstrable. The legislature clearly intended that some time should intervene. Now suppose the statute had provided that only one day should intervene between the times mentioned, and that the last day of the term of the trial court should be the 7th, and the first day of the next term of the Appellate Court the 8th of the month; then, applying the rule that, in computing the time, the first day of the Appellate Court term is to be counted, we would have a day intervening in contemplation of law, but not an instant intervening in fact. We are of opinion

that the statute is so plain as to leave no room for construction, and that ten full days must intervene between the last day of the term at which the judgment was rendered and the sitting of the court to which the appeal is taken, and that the first day of the session of the Appellate Court must be excluded in the computation of the ten days.

In *Richardson et al. v. Ford et al.*, 14 Ill. 332, the court say: "If an act is to be done between two certain days, it must be performed before the commencement of the latter day. In computing the time in such a case, both the days named are to be excluded. A grant of land described as lying between two lots would not embrace either of the lots. A policy of insurance on goods 'to be shipped between February 1st and July 15th,' does not cover goods shipped on either of those days," etc.

Thus far we have assumed Saturday, February 19th, to have been the last day of the January term; but it is by no means free from doubt, whether Sunday, February 20th, was not, in legal contemplation, the last day of the January term. The February term of the trial court did not, as before stated, commence till February 21st, and there is nothing in the record showing an adjournment Saturday, February 19th, to the next succeeding term.

In *Brown v. Leet*, 136 Ill. 205, the question was whether Sunday was to be counted as one of the days of the October term of the Supreme Court, and the court say: "For most purposes a term of court is considered as one day (*Chiniquy v. The People*, 78 Ill. 570); but for the purposes of this section of the Practice Act, the term is made to consist of days, and the word 'day' therein is used in its popular sense. The fact that Sunday is not a judicial day does not, within the contemplation of the statute, render it any less a day of the term."

In the present case, if Sunday, February 20th, is to be considered the last day of the January term of the Circuit Court, then, even counting March 1st, the first day of the Appellate Court term, in computing the time, but nine days intervened; excluding it, only eight days intervened.

It is true that the decision in *Brown et al. v. Leet et al.*,

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supra, was with reference to a Sunday which intervened between the first and last days of the term, and not to a Sunday which next succeeded the last secular day of the term; but the language of the court, viz., "The fact that Sunday is not a judicial day does not, within the contemplation of this statute, render it any less a day of the term," applies as much to a Sunday next succeeding the last secular day of the term, as to any preceding Sunday of the term.

Appellant not being required to file a transcript at the present term, the motion to dismiss the appeal is overruled.

W. W. Jackson v. Duquoin Coal Mining Co.

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1. **QUESTIONS OF FACT—*For the Jury.***—The question as to whether some of the subsequent dealings between the parties were to be governed by the original contract alone, or by that in connection with later oral agreements between the parties, is one of fact for the jury, to determine from the facts and circumstances shown in evidence.

2. **VENDOR AND VENDEE—*Damages After Repudiating the Contract.***—Where the vendee under a contract for the sale of coal wrote to the vendor, "You can consider our contract off and stop all shipments on all orders; we will not take or receive any more coal under this contract," *it was held* that the trial court properly refused to admit evidence of damages claimed because of the failure of the vendor to deliver coal after the receipt of the letter.

Assumpsit.—Breach of contract. Trial in the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Verdict and judgment for plaintiff, \$9,058.72. Error by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

ULLMANN & HACKER, attorneys for plaintiff in error.

E. H. GARY and CHURCH & McMURDY, attorneys for defendant in error.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

The defendant in error was plaintiff in the suit below,

and brought an action against the plaintiff in error to recover upon its claim for the value of coal sold and delivered, and damages for coal refused, under certain contracts claimed to have been entered into between the parties.

By stipulation, made at the trial below, it was agreed that under the declaration filed, the plaintiff might introduce any evidence relating to the agreements between the parties or claims referred to in the declaration, or a breach or breaches thereof, which would be competent under any declaration or counts properly drawn, and any evidence which might be introduced under replications properly drawn, and that under the pleas of defendant filed in the case, it might introduce any evidence which would be admissible under any additional pleas properly drawn.

So the case and the defense were respectively what the evidence showed, irrespective of pleadings.

There was a written contract, and there was evidence tending to prove one or more subsequent oral contracts, all relating to the subject of a sale and delivery of coal by the defendant in error to the plaintiff in error, during the months of November and December, 1891. All coal delivered prior to November was paid for and is not in question, and there was no coal delivered after December, 1891, notice having been given in that month, by the plaintiff in error, that no more coal would be received.

The written contract, by its terms, contemplated merchantable coal to be furnished from the mines of the defendant in error, and perhaps it may be said with sufficient accuracy, that the underlying substantive fact in controversy was whether some of the subsequent dealings between the parties were to be governed by that instrument alone, or by that in connection with later oral agreements under which the defendant in error was justified in furnishing coal from other mines in filling certain orders of the plaintiff in error. Such question was peculiarly one for the jury, and we think the verdict is a substantially just conclusion from the facts and circumstances shown in evidence, and ought to stand, if there was no material error in law committed.

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Upon December 12, 1891, the plaintiff in error wrote a letter to the defendant in error, in the concluding part of which it was said: "You can consider our contract off and stop all shipments on all orders. We will not take or receive any more coal under this contract."

That letter being introduced in evidence, and not being avoided, the trial court, properly, as we think, refused to admit evidence of damages claimed, because of the failure of the defendant in error to deliver coal after December 12th. It would be manifestly wrong to allow one party to a contract to have damages because the other party took him at his word in repudiating and terminating the contract.

Presumably, and in consistent harmony with its theory in that regard, the trial court upon its own motion gave to the jury an instruction which the plaintiff in error claims constitutes serious error. The instruction was as follows:

"The court instructs the jury that upon all the evidence in this case the verdict must be for the plaintiff; the only questions submitted to the jury being the question as to the plaintiff's right, if any, to recover on account of coal rejected by defendant, and the question as to right, if any, of defendant to set off against and deduct from plaintiff's damages, the damages, if any, claimed by defendant upon its plea of set-off for failure, if any, of plaintiff to ship coal claimed by defendant to have been ordered in November and December, 1891."

Critically considered, by itself, such instruction does not completely state the issues presented by the pleas of set-off interposed by the defendant. One or more of such pleas referred to the alleged failure of the plaintiff to furnish coal of agreed standard, and there was evidence that tended to show some of the coal shipped, but not accepted, was inferior in quality, and not of the kind contracted for.

As there was no controversy concerning coal shipped in any months other than November and December, the only right to set-off, referred to coal ordered and shipped, and inferior coal delivered in those months.

It is said in the brief for plaintiff in error, "the only claim for damages made by defendant grew out of the shipment of inferior coal, and that shipped from other mines, and not on account of the non-delivery of coal ordered in November and December." The alleged inferior and non-contract coal that was shipped was the basis for the refusal by plaintiff in error to accept any more coal, and the coal so claimed to be inferior and not up to contract was not accepted, but was rejected and turned back to defendant in error. In other words, plaintiff in error refused to accept, and did not take such coal.

The whole substantial question seems, therefore, to be covered by the instruction, limiting, though it did, the plaintiff's right to recover on account of coal that was rejected, and the defendant's right to set off damages for failure to ship contract coal ordered in November and December.

But if there be any doubt about it, we think a general instruction, given at the request of plaintiff in error, removed all uncertainty. It was as follows:

"If the jury believe from the evidence that the plaintiff was guilty of a breach of the contract sued on and that the defendants are entitled to damages against the plaintiff by reason of such breach, if any, they may set off whatever they find such damages, from the evidence, to be, if any, against the amount that they may find from the evidence to be due the plaintiff and bring in their verdict accordingly."

We discover nothing in the other argued errors that entitles them to special attention.

The case, though contained in a voluminous bill of exceptions, is in reality a simple one, and we think a just conclusion was reached in the trial court.

The judgment of the Superior Court is therefore affirmed.

Arnold v. Cannon.

**Adolph Arnold, Herman Arnold, Theodore Arnold and
Benjamin F. Baker v. Henry W. Cannon, Jr.**

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| 85 | 539 |

1. **INSTRUCTIONS**—*Requiring More than a Preponderance of the Evidence.*—An instruction which requires something more than a mere preponderance of the evidence as the basis of action by the jury is erroneous.

Assumpsit, to recover moneys in a bank. Trial in the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Verdict and judgment for plaintiff. Defendant appeals. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed May 26, 1898.

STATEMENT OF FACTS.

This suit was brought by appellee against appellants and two others to recover moneys deposited by appellee, as a depositor, with a bank known as the Haymarket Produce Bank. This bank had been conducted by the defendants below as copartners, and the dealings of appellee with the bank begun at a time when all of such defendants were members of the copartnership. There was a change in the copartnership on November 5, 1895, by which appellants withdrew from the firm, leaving Howe and Bodenschatz, co-defendants below, but not appealing here, as the only remaining members of the firm. After the change, appellee continued to transact business with the bank. The greater part of the claim sued on was for money deposited after appellants had withdrawn from the firm. One of the issues of fact on the trial was as to actual notice to appellee of the change in the copartnership. The trial resulted in a verdict and judgment for appellee.

ESCHENBURG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

COLLINS & FLETCHER, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The giving of certain instructions, tendered by appellee, is assigned as error, and we regard the disposition of this assignment of error as determinative of the appeal.

The instructions complained of are as follows:

6th. "The jury are instructed that no presumptions or appearances of notice can be so strong as to be a notice in fact, or actual notice, when it has not been proved by the defendants to the satisfaction of the jury that the plaintiff really did have knowledge or the means of knowledge of the dissolution of the copartnership."

7th. "The jury are instructed that no means of knowledge of the dissolution of the firm of Arnold Bros., Baker & Co., was sufficient to be regarded as actual notice to the plaintiff, unless the plaintiff knew that he had in his possession that means of ascertaining and neglected to make use of it."

The instructions were erroneous. The sixth is faulty, because it requires something more than a mere preponderance of the evidence as the basis of action by the jury, in that it makes it necessary that notice be proved "to the satisfaction of the jury." *Stratton v. The C. C. H. Ry. Co.*, 95 Ill. 25; *O. O. & F. V. Ry. Co. v. McMath*, 4 Ill. App. 356; *Bunchwitz v. Tyman*, 11 Id. 187.

The seventh is faulty, because it requires that notice, in order to be effectual, must have been known by appellee when received, to contain the requisite information or means of ascertaining same. In other words, it told the jury, in effect, that although documents were served upon appellee, or given to him, which were sufficient to convey notice, yet, if appellee neglected to examine the same, and did not, in fact, know what they contained, such service would be insufficient to constitute notice. It may be that, under the evidence here, the seventh instruction did not work any prejudice to appellants. It was, however, for the jury to determine whether the documents, viz., the receipts signed by appellee, were such as constituted notice, irrespective of whether appellee may have read their contents or not.

Owen v. *Ætna Iron Works.*

It can not be said that the sixth instruction did not mislead the jury in weighing the evidence and determining the issue as to notice. The question of notice was the principal issue of fact in the case. The jury should have been accurately instructed as to the necessary proof.

Questions raised as to other instructions are disposed of by the decision of this court in *Arnold v. Hart*, decided at March term, 1898, and not yet reported.

The judgment is reversed and the cause remanded.

Charles S. Owen v. *Ætna Iron Works*, J. Louis Pfau, Jr., Pauline M. Pfau and Lenore P. Pfau.

1. **PRACTICE—*On Reversal of Causes.***—Where a cause is reversed by the Appellate Court and remanded to the Circuit Court with directions, the Circuit Court can proceed only according to the directions of the Appellate Court.

2. **SAME—*Error in Remanding Order.***—Where there is an error in the mandate of the Appellate Court remanding a cause to the Circuit Court, with directions for further proceeding, the remedy of the person aggrieved is by petition for a rehearing in the Appellate Court.

Bill, for an accounting. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Hearing on remanding order and decree pursuant to the mandate of the Appellate Court. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

KNIGHT & BROWN, attorneys for appellant.

SIDNEY C. EASTMAN and BOWEN W. SCHUMACHER, attorneys for appellees.

Where a cause has been reviewed by this court, and remanded with directions as to the decree to be entered, a party, on a subsequent appeal, can not assign for error any cause that accrued or existed prior to the judgment of this court. All errors not assigned will be considered as waived

and can not afterward be urged. *Union Mutual Life Ins. Co. v. Kirchoff*, 149 Ill. 536 (542).

“If appellant suffered any wrong by the decision of this court, when the case was before it at a former term, that wrong could only be corrected on application for rehearing.” *Hollowbush v. McConnel*, 12 Ill. 203; *Wadhams v. Gay*, 83 Ill. 250; *Washburn and Moen v. Chicago Gal. Wire Fence Co.*, 119 Ill. 30; *Mix v. People*, 122 Ill. 641; *Green v. City of Springfield*, 130 Ill. 515; *Newberry v. Blatchford*, 106 Ill. 584; *Hook v. Richeson*, 115 Ill. 431.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This case was before the court at the October term, 1895, on the appeal of the *Ætna Iron Works et al. v. Charles S. Owen*. Appellant's claim, with others involved in the suit, was considered, and the court reversed the decree of the Circuit Court, and by its mandate directed as follows: “Therefore it is considered by the court that for that error, and others in the record and proceedings aforesaid, the decree of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and that this cause be remanded to the Circuit Court of Cook County, with directions to enter a decree in favor of appellee for the amount of his judgment against the *Ætna Iron Works*, with interest, and to order to be paid thereon so much as may be necessary to satisfy it, out of the moneys paid to and held by the clerk of the Circuit Court, to abide the result of the suit as shall remain thereof, after allowing to said Lenore P. Pfau out of said moneys the amount of \$750 paid by her to the Illinois Steel Company, with interest at five per cent per annum from the date of the assignment by the Steel Company to her.” The above is all of the mandate necessary to be considered on this appeal.

The amount of money held by the clerk of the Circuit Court, referred to in the mandate, was \$1,200, and appellant's judgment against the *Ætna Iron Works*, exclusive of

interest, was \$793.22. The Circuit Court, on receiving the mandate, entered a decree, the only part of which relevant to the question now presented, is as follows :

“It is further ordered, adjudged and decreed, that of the sum of \$1,200, being the amount on deposit with the clerk of this court under previous order herein, the clerk pay and turn over to the solicitors of Lenore P. Pfau, Sidney C. Eastman and Bowen W. Schumacher, the amount of \$750 (being the amount paid by her to the Illinois Steel Company for its claim against said *Ætna Iron Works* as aforesaid) together with interest thereon at the rate of five per centum per annum from the 13th day of February, A. D. 1894, to the date of the payment of said money to her.

“And it is further ordered, adjudged and decreed that the clerk of this court pay the balance of said sum of \$1,200, remaining in his hands, after the payment to said Lenore P. Pfau, to the solicitors of said Charles S. Owen, to be credited by him on his judgment obtained by him on the 16th day of June, A. D. 1894, against said *Ætna Iron Works* and J. Louis Pfau, Jr.”

Appellant's counsel complain of this decree on two grounds: First, that it is not in accordance with the mandate of this court; and, second, that the Circuit Court should have decreed that appellant recover his costs in that court. The clear meaning of the mandate is, that from the amount held by the clerk of the Circuit Court Lenore P. Pfau should first be paid the sum of \$750, with interest from the date mentioned in the mandate, and that the remainder should be applied, as far as it would go, to the satisfaction of appellant's judgment. The money to be paid to appellant was, by the express terms of the order, to be paid out of the moneys which should remain after payment to Lenore P. Pfau of the amount decreed to be paid to her, and it is apparent that if she was entitled to be preferred to appellant in the distribution of the fund, as this court found, the mandate could not have been otherwise. The decree of the Circuit Court is in conformity with the mandate, and that court was powerless to enter any decree

other than that directed by the mandate. *Parker et al. v. Shannon*, 121 Ill. 452; *Sanders v. Peck et al.*, 131 Id. 407.

The Circuit Court having rendered the only decree which it could legally render, the citation of authorities, to the effect that errors in the decree can not be successfully assigned, would be superfluous. Appellant's counsel claim that this court erred in its judgment, in the former appeal, in holding that Lenore P. Pfau was entitled to any of the fund held by the clerk of the Circuit Court, and, also, that the court was mistaken as to the amount of the fund so held. If these contentions are correct, appellant's remedy was by petition to this court for a rehearing. Appellant pursued that remedy, and his petition was denied for reasons stated in the opinion of the court, Mr. Justice Gary delivering the opinion. This exhausted appellant's remedy in this court. We are powerless to review the former judgment of this court (*Ry. Co. v. Hoyt*, 44 Ill. App. 48), and no assignment of errors lies to that judgment on the record before us. *Union Mut. L. Ins. Co. v. Kirchoff*, 149 Ill. 536.

The mandate contained no directions as to costs, and neither did the decree appealed from. It was a matter resting in the direction of the Circuit Court whether the appellant should recover his costs. 1 S. & C. Stat., Ch. 33, Sec. 18.

The decree will be affirmed.

Albert A. Kraft v. Alfred R. Porter.

1. PLEADING—*Justification by a Justice of the Peace.*—In a plea of justification by a justice of the peace, in an action of trespass for false imprisonment, it is a sufficient allegation of his official character to state that the defendant "was a justice of the peace in and for the county aforesaid."

2. SAME—*Averments of What Constitutes a Contempt.*—In a plea of justification, by a justice of the peace in an action of trespass, it is a sufficient allegation to state that the plaintiff "did willfully and contemptuously conduct himself in a disorderly and disrespectful manner," etc.

3. JUSTICE OF THE PEACE—*Jurisdiction to Hear Evidence.*—A jus-

Kraft v. Porter.

tice of the peace has jurisdiction in a cause pending before him to hear evidence for the purpose of determining whether he has jurisdiction to try and decide the cause upon its merits.

Trespass, for false imprisonment. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Demurrer to special plea overruled. Judgment for plaintiff, *nil dicit*. Defendant appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

WILLIAMS, KRAFT & RUST, attorneys for appellant.

A person sued in trespass, undertaking to justify his act on the ground that it was done by virtue of being an officer, and the power granted to such officer by law, is required to show that he was at the time an officer in truth and right, duly commissioned and qualified to act as such; that he was an officer *de jure*, not simply an officer *de facto*. *Schlenker v. Risley*, 3 Scam. 486; *Case v. Hall*, 21 Ill. 632; *Outhouse v. Allen*, 72 Ill. 529; *Gilligan v. Stephens*, 4 Ill. App. 401; *Schemerhorn v. Mitchell*, 15 Ill. App. 419.

L. B. LANGWORTHY, attorney for appellee.

The rule is that when a pleader sets up the judgment of an inferior tribunal he must set out in detail the facts conferring jurisdiction both of the subject-matter and the person of the defendant. 2 Black on Judgments, Sec. 966; *Willey v. Strickland*, 8 Ind. 453; *Daken v. Hudson*, 6 Cow. (N. Y.) 221.

The judgments of inferior courts can never be assailed indirectly for errors not affecting the jurisdiction, and to require the appellee to allege and prove the evidence upon which the inferior court based its judgment of conviction would be a violation of the rule. 1 Black on Judgments, Sec. 250; *Comstock v. Crawford*, 3 Wall. (U. S.) 396; *Gru-senmeyer v. Logansport*, 76 Ind. 549; *Long v. Burnett*, 13 Iowa, 28; *Shoemaker v. Brown*, 10 Kan. 383.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellant sued appellee in trespass and filed a declara-

tion containing one count, which, omitting the formal commencement, is as follows :

“ For that the defendant on, to wit, the 15th day of February, A. D. 1895, in the county of Cook and State of Illinois, did, without any authority of law, issue and deliver to George A. Samonski a certain paper, in and by which it was purported and pretended that the people of the State of Illinois commanded any constable of said county to arrest and take the said plaintiff and deliver him to the keeper of the common jail of said county, and there to imprison him. And the said defendant also then and there directed and commanded the said George A. Samonski to arrest and imprison the plaintiff as in the said paper it was commanded, by virtue of which paper and command of the said defendant, the said George A. Samonski did then and there make an assault upon the plaintiff, and arrest, and with great force did violently lay hold upon and seize the person of plaintiff, and forcibly conducted him to the county jail of Cook county, where the said plaintiff was thereafter imprisoned, without any reasonable or probable cause whatever, for the space of, to wit, thirty-six hours then next following, during all of which time the said plaintiff suffered great indignity; contrary to the laws of this State and against the will of the plaintiff, and other wrongs to the plaintiff the said defendant then and there did, against the peace of the people of the State of Illinois, and to the damage of the plaintiff of fifteen thousand dollars, and therefore he brings suit,” etc.

Appellee pleaded the general issue and the following special plea :

“ And for a further plea in this behalf the defendant, Alfred R. Porter, says that the plaintiff ought not to have his aforesaid action against him, because he says that he, the said Alfred R. Porter, before and at the time when, etc., was a justice of the peace in and for the county aforesaid; and so being such justice and having jurisdiction of the matters hereinafter mentioned, the said plaintiff, Albert A. Kraft, on, to wit, the 16th day of February, A. D. 1895,

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appeared before this defendant, while this defendant was acting as such justice of the peace in the trial of a certain action at law then pending before this defendant, as such justice of the peace, at the office of this defendant, in the town of Hyde Park, in said county of Cook, wherein one George B. Chamberlain was plaintiff, and Mrs. Gordon Ball was defendant, and while said proceedings were in progress and being heard and considered by this defendant as such justice of the peace, the said Albert A. Kraft, being then and there present, did willfully and contemptuously conduct himself in a disorderly and disrespectful manner, whereupon the said Albert A. Kraft was then and there called before the said defendant, as such justice of the peace, to show cause why he should not be convicted and punished according to law for such contempt, and after a full hearing before this defendant, as such justice of the peace, of and concerning the said disorderly and disrespectful conduct as aforesaid, the said Albert A. Kraft was by the consideration of this defendant, as such justice of the peace, thereof adjudged guilty and convicted of contempt of the said court, and was by this defendant, as such justice of the peace, then and there fined for such contempt in the sum of five dollars, and this defendant also ordered as a part of said judgment that the said Albert A. Kraft be committed to the jail of said county, there to remain until the said fine should be fully paid, or until he be discharged according to law. That said plaintiff refused to pay said fine or any part thereof, and thereupon, to wit, the said 16th day of February, A. D. 1895, this defendant, as such justice of the peace, duly and regularly issued his certain writ or warrant of commitment, in the name of the people of the State of Illinois, directed to the sheriff, or to any constable of said Cook County, commanding him to take the said Albert A. Kraft and deliver him to the keeper of the jail of said county, together with the said warrant of commitment, and commanding the said keeper of said jail to receive the said Albert A. Kraft into his custody, in the said jail, and him there safely keep until he paid the said fine, or until he

should be discharged according to law, which said warrant of commitment was by this defendant as such justice of the peace delivered to the said George A. Samonski, who was then and there a constable of the county aforesaid, to be by him executed according to law, as he, the said George A. Samonski, lawfully might for the cause aforesaid; and the said George A. Samonski, as such constable as aforesaid, in obedience to the said warrant, afterward, to wit, on the day aforesaid, there gently laid his hands upon the plaintiff and arrested him, using only necessary force in so doing, and then and there conducted the plaintiff—he, the said plaintiff, refusing and failing to pay said fine, or any part thereof—to the said jail of said county, and there delivered him to the keeper of said jail, where the plaintiff was confined and kept by the keeper of said jail, pursuant to said warrant, for about the space of time in said declaration mentioned, when he was thereafter therefrom discharged according to law; which are the same supposed trespasses in the said declaration mentioned, and whereof the plaintiff has complained,” etc.

Appellant demurred to the special plea, assigning special causes of demurrer not necessary to be set out in full in this opinion, as we shall consider only the points relied on in appellant's brief. The court overruled the demurrer and, appellant electing to abide by his plea, rendered judgment for appellee, and this is assigned as error.

Appellant's counsel contend: First, that the plea should allege facts showing that the appellee, at the time he fined appellant, was a justice of the peace *de jure*, and that it is not sufficient to allege merely that he was a justice, as is alleged in the plea. We have examined the cases cited by appellant in support of this contention and do not regard them as in point. In *Outlaw v. Davis et al.*, 27 Ill. 467, which was trespass against a justice for the arrest of the plaintiff on an alleged illegal warrant, the plea averred that the defendant “was and is now an acting justice of the peace,” and the court held the plea sufficient. The allegation that appellee “was a justice of the peace in

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and for the county aforesaid," is a sufficient allegation of appellee's official character, and so are the precedents. Puterbaugh's Pl. & Pr., Ed. 1896, p. 364; 3 Chitty's Pleading, Sec. 1084.

In *Schlencker v. Risley*, 3 Scam. 486, which seems to be chiefly relied on by appellant's counsel, the court say that Williams, one of the defendants, justified issuing the process as a justice of the peace. A plea justifying as justice is clearly bad. In the present case there is a positive averment that appellant was, at the time when, etc., a justice of the peace, and in support of this allegation evidence might be given that he was a duly elected, qualified and commissioned justice.

Secondly: It is contended that the plea does not specifically aver the facts constituting the alleged contempt; that what is averred in that regard is merely a conclusion. The plea alleges that "the said Albert, being then and there present, did willfully and contemptuously conduct himself in a disorderly and disrespectful manner," etc. Any person who appears before a justice of the peace, while acting as such justice, and who fails to "demean himself in a decent, orderly and respectful manner," may be fined by the justice for contempt in any sum not exceeding five dollars. 2 S. & C. Stat., Ch. 79, par. 162.

We think the averment of the plea that appellant "did willfully and contemptuously conduct himself in a disorderly and disrespectful manner," is a sufficient averment of what constituted the contempt.

In *Clark v. The People*, Beecher's Breese, 340, Clark was fined for contempt by a justice of the peace, and appealed to the Circuit Court. The latter court refused to review the action of the justice and dismissed the appeal. Clark then appealed to the Supreme Court, which court affirmed the judgment of the Circuit Court, saying: "The magistrate having had jurisdiction to impose the fine, the Circuit Court properly refused to inquire into the nature of the contempt, and very properly dismissed the appeal." In citing this case we would not have it implied that, in our

opinion, a court of review could not interfere in a case in which it appeared from the record that an act was treated as a contempt which was manifestly not a contempt. In *Lancaster v. Lane*, 19 Ill. 242, which was trespass against a justice, it appeared that Lane and another person fought in the presence of the justice immediately after the conclusion of a trial before the justice. The justice fined them five dollars each and issued, consecutively, three executions, one of which was levied on the property of Lane. The justice offered his docket in evidence in justification, which contained the following: "The fite was willingly fit in view of the justice." This was the whole charge stated in the docket. There was no statement in the docket of any act by either of the parties fined beyond the mere statement that they fought, and no evidence was heard by the justice. The Circuit Court excluded the docket, but the Supreme Court held this error, saying, among other things: "We understand the principle to be well settled that when a magistrate has jurisdiction, as well over the offense as over the person of the offender, his acts, though ever so erroneous, will not make him a trespasser, and that a conviction by him, still subsisting and valid upon the face of it, on a subject within his jurisdiction, is a legal bar to an action for anything done under such conviction. His judgment is conclusive until reversed."

In the same case the court say: "This court will go far to sustain the proceedings of justices of the peace in all cases in which they have jurisdiction, however erroneously it may be exercised." We are of opinion that the plea avers a case in which the justice had jurisdiction both of the person of appellee and the offense.

Thirdly: It is contended that the plea should aver facts showing that the justice had jurisdiction to try the case which he was trying when the contempt is alleged to have been committed.

The statute, Ch. 79, par. 162, authorizes the imposition of a fine for contempt by any person present before a justice "when acting as such, or who shall be present at any legal

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proceeding before a justice." The plea, after averring that appellee was a justice, avers, in substance, that while the appellee was, as said justice of the peace, acting in the trial of a cause, and while the proceedings were in progress, the contempt was committed. It might be that, in law, he had not jurisdiction to finally determine the cause pending before him on the merits, and yet would have jurisdiction to hear the evidence, because he could only determine, from the evidence, whether he had jurisdiction. In other words, a justice of the peace has jurisdiction in a cause pending before him to hear evidence, for the purpose of determining whether he has jurisdiction to try and decide the cause on its merits. We are of opinion that the demurrer to appellee's special plea was properly sustained.

The judgment will be affirmed.

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Thomas J. Prendergast et al. v. John McNally et al.,
Consolidated with
Louis Bastrup et al. v. John McNally et al.

1. **PRACTICE**—*Where Part of the Record is Not Properly Certified.*—Where part of the record is not properly certified, the proper practice is to move to strike the part not properly certified from the record.

2. **EQUITY PRACTICE**—*Disposition of Exceptions to Master's Report.*—A decree disposing of exceptions to a master's report *en masse* is not a proper practice; it should specify what exceptions were sustained and what overruled. Sustaining exceptions *en masse* leaves the Appellate Court no alternative but to examine the report and evidence in detail, to determine, if possible, if there is any basis on which the decree may be sustained.

3. **MECHANICS' LIENS**—*Under the Act of 1874.*—The statute of 1874 gave the right to a lien only where the contract was with the owner of the land.

4. **SAME**—*Building upon Adjoining Lots.*—Where buildings upon separate adjoining lots are erected under a single contract with the owner of both lots, the porch roof extending as a continuous roof across both lots, and the whole building heated by one steam plant, *it was held* to constitute one building, and unnecessary that a claim for a lien should be divided between the two lots.

5. **AGENT**—*Power to Bind His Principal by a Contract Under Seal.*—In order to bind his principal by a contract under seal, and to make it his contract, it must purport on its face to be the contract of the principal, and the seal must purport to be his. The agent can not ordinarily bind his principal by a sealed contract in his own name, nor can the principal ordinarily avail himself of such a contract, and sue the other contracting party thereon. An undisclosed principal whose agent has made such a contract in his behalf, can neither sue nor be sued upon it.

6. **ESTOPPEL**—*Husband and Wife—Mechanic's Lien.*—When the contract to erect a building upon the wife's lot is made with the husband, in the belief that he is the owner (the contracts stating such to be the case), if the wife with full knowledge consents to and approves of all his acts and doings with reference to the making of the contract and the construction of the buildings, she will be estopped from asserting her title, as against the contractor, in a proceeding to enforce a mechanic's lien.

7. **FRAUD**—*Sealed and Unsealed Instruments—Equity.*—A court of equity should no more permit a fraud to be perpetrated under the guise of a sealed contract than it should when the contract is verbal or in writing, but not under seal.

Mechanic's Lien Proceedings.—Trial in the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Hearing and decree for defendants; complainants appeal. Heard in this court at the March term, 1898. Reversed with directions. Opinion filed May 9, 1898.

STATEMENT OF FACTS.

Appellant Prendergast filed his bill September 17, 1894, in the Circuit Court of Cook County, against the appellees, Catherine and John McNally and others, seeking to enforce a mechanic's lien for mason work and materials upon lots 23 and 24, block 1, in Miller & Rigdon's subdivision of block 20, in School Trustees' subdivision in section 16, township 38 north, range 14, in Cook county, and known as Nos. 601 and 603 Fifty-fifth street, Chicago.

Appellant Eilenberger filed a cross-bill, asking a mechanic's lien for carpenter work and materials, on the same lots; appellant E. Burkhardt & Son, a corporation, filed its intervening petition, also asking a mechanic's lien on the same lots for cut stone work and materials, and appellant Norton filed his intervening petition, asking a mechanic's lien on the same lots for drawing plans, etc., and superintend-

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ing the construction of a building. The bill of Prendergast was subsequently twice amended, issues were made by answers of the several parties in interest, and replications to such answers.

Five other cross-bills and intervening petitions were filed in the case by as many lien claimants, on which issues were made and the several claims disposed of by the court, but they are not here in question, though contained in the record. The case was referred April 5, 1895, to the master to take proof and report the same to the court, with his opinion on the law and the evidence. The appellants Bastrup & O'Neill, on December 19, 1895, filed their bill in the Superior Court of Cook County against said Catherine and John McNally, all the appellants and others, to foreclose a trust deed on said lots made by the McNallys to secure the payment of their promissory note of \$3,000 made to Bastrup & O'Neill, dated May 10, 1895, and bearing interest at six per cent per annum, which trust deed was recorded May 27, 1895. In the Superior Court the McNallys and all the appellants (except Norton, who filed an answer claiming a lien) were defaulted and the bill as to them was taken as confessed, and the cause, after issues made, was referred to the master of that court to take proof and report his conclusions thereon. The master reported to the Superior Court, among other things, that Bastrup & O'Neill were entitled to a lien and decree by virtue of their trust deed, amounting to \$3,350, and interest at six per cent per annum from May 10, 1895, on \$3,000, to date of his report, May 13, 1896; that Prendergast, Eilenberger and Burkhardt & Son, having made default and the bill having been taken as confessed as to them, if they were entitled to any liens, the same accrued since the lien of Bastrup & O'Neill, and was subject to such lien; that Norton, having failed to make any proof of his lien, was not entitled to a mechanic's lien, and recommended a decree, among other things not in question, that the lots be sold to pay the amount found due to Bastrup & O'Neill, and that any surplus remaining be paid to Catherine McNally.

Before any further proceedings in the Superior Court, that court, May 25, 1896, ordered that the cause of Bastrup & O'Neill v. McNally et al., be transferred to the Circuit Court, to be consolidated with the suit of Prendergast v. McNally et al., then pending in the latter court, and that all testimony theretofore taken before the master in the Superior Court be considered as evidence taken in the Circuit Court, and the consolidated case of Prendergast v. McNally et al., and the findings made by the master in regard to claims proved before him, should be considered as master's findings in the Circuit Court, and that no further testimony should be taken on either side, and that all pleadings, orders, reports and records filed or entered in the Bastrup case in the Superior Court should stand as pleadings, orders, reports or records in the Bastrup case in the Circuit Court, and in the cause of Prendergast v. McNally consolidated therewith.

The master of the Circuit Court, having made his report, dated January 24, 1896, upon evidence taken before him in the case of Prendergast against McNally et al., it was filed in the Circuit Court, together with the objections thereto of the several parties, and the evidence on which the report was based, as were also filed all the files, orders and master's report and objections thereto, and evidence on which the latter report was based, of the case of Bastrup & O'Neill v. McNally et al., and thereafter, without any formal order of consolidation being entered by the Circuit Court, there was a hearing before the chancellor of the two causes as if consolidated, without any objection by any of the parties being made in the Circuit Court, upon all the pleadings, the two masters' reports, the evidence on which said reports, respectively, were based, the objections of the several parties to said reports, which, by order of court, were to stand and be considered as exceptions to the reports, respectively, and decree was entered in the two cases consolidated, finding among other things, not in question on this appeal, that appellants Eilenberger, Norton and Burkhardt & Son, were not entitled to liens, and dismissing the cross-bill of Eilen-

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berger and the intervening petitions of Burkhardt & Son and Norton, also finding that Prendergast was entitled to a lien for only \$43.20, and that he was not entitled to a lien for the balance of his claim, and decreeing a lien in his favor for \$43.20; also finding that Bastrup & O'Neill were entitled to a lien under their trust deed as of May 27, 1895, and decreeing a sale of the lots in question, and distribution of the proceeds, after payment of costs, among the several parties, claimants of liens, according to priority, as fixed by the decree. This decree, among other things, recites the order of the Superior Court entered in the Bastrup case above stated, and that the complete record of and all files in that cause transferred to the Circuit Court are made a part of the record in the case of Prendergast v. McNally et al., "and the said cases having been and being hereby consolidated by this court, and the thus consolidated causes now coming on to be heard upon the amended bill of complaint of Thomas J. Prendergast, etc., * * * and the consolidated causes coming on to be heard upon the bill of complaint of Louis Bastrup and Hugh O'Neill, etc., * * * which said bill has heretofore been and is hereby taken as confessed by and against the following defendants," among others, Prendergast, Eilenberger and Burkhardt & Son, "but which confession is hereby set aside." It also states that it appears to the court "that all issues in said consolidated cause are made up and complete, as if both were one case commenced and pending in this court."

It is also ordered by the decree that the two reports of the masters on which the hearing was had, "be and the same are hereby approved and confirmed in all matters consistent with this decree, and as to all matters inconsistent with this decree the said reports are hereby disapproved, * * * and that all objections and exceptions heretofore filed by either of the parties to the consolidated causes to the reports of the masters (naming them), to sustain which would be inconsistent with this decree, are hereby overruled, and as to all such objections and exceptions, to overrule which would be inconsistent with this decree, the said objections and exceptions are hereby sustained."

There is nothing further in the record by which it can be told what exceptions to the master's reports were sustained and what overruled by the court. There are 158 exceptions to the report of the Circuit Court master, and eleven exceptions to the report of the Superior Court master, and we have no means of knowing from the record on what theory or for what reasons the chancellor allowed or disallowed any claim for lien, except as we may infer by examination of the very voluminous record to find the evidence for and against the several claims. It is, however, unnecessary to consider the report of the Superior Court master except as to the claim of Bastrup & O'Neill under their trust deed, as it contains no reference to the claims of appellants Prendergast, Eilenberger and Burkhardt & Son, save that it states they were in default, and if they had any liens the same were subject to the lien of Bastrup & O'Neill, and as to appellant Norton, that he failed to offer any proof and was therefore not entitled to a lien.

The report of the Circuit Court master in so far as it relates to the matters in question in this appeal, finds the following general facts, in substance, which are sustained by the clear preponderance of the evidence in the record, viz.:

Catherine McNally was the owner in fee of the lots in question in 1894, and the title of record had been in her from September, 1883. Each of the appellants did work and furnished materials for the same or did work on a new building located on said lots under contracts with John McNally, the husband of Catherine, all of them being in writing and under seal, except Norton's. Prior to the construction of this building Catherine and John McNally resided in a frame building on the north front of the same lots, Garfield Boulevard, which was moved to the rear of the lots preparatory to the construction of the new building, and placed across the two lots and made to front the east on Wright street, and they continued to reside in this frame building all the time the new building was in process of construction, and in plain sight of it, only a few feet distant.

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John McNally, at the time of the making of the contracts with appellants, and during the construction of the building, had very small means, and was not in a position financially to construct the building, or any considerable part of it.

The appellant Norton, an architect, prepared plans in 1893, at the request of John McNally, for a building which was intended to cover the whole of the lots. Norton saw Mrs. McNally, and explained the plans to her, being referred to her by her husband. She also called at his office with her husband and examined the plans. She decided to have a smaller building, not covering the whole lots, for which amended plans were prepared by Norton about January 1, 1894, under which the building in question was constructed. She also talked with Prendergast about moving the frame building, and told him that she preferred to have the new building constructed by the later plans, and talked with him as to its cost and style, particularly referring to a bay window shown in the plans. When bids were put in by the contractors, McNally took them from Norton's office before the contracts were let, and examined them with his wife and Norton. Mrs. McNally told Norton to attend to letting the contracts, and at one time, if he, Norton, did not let the plumbing contract in a hurry, she would get a plumber herself. She finally selected the plumbing and let that contract herself. On different occasions during the construction of the building she expressed an anxiety to get the building rented so she might get an income from it as soon as possible.

The written contracts describe John McNally as owner and refer to him as owner in numerous places, but neither of them has a specific description of any property, referring to the property as "grounds" and "premises," and are all under seal.

Before the construction of the building commenced, and on February 13, 1894, Mrs. McNally made application for and secured a loan of \$13,000, in the application for which, signed by her, she describes in detail the building in ques-

tion, and states that it is to be "a residence for ourselves," and is to cost not less than \$15,000, and that the money applied for was to be paid "for labor, material and otherwise," at the option of the persons making the loan, and without further order and request on her part, and that if the loan is not sufficient for the satisfactory erection and completion of the building, she agrees to supply additional funds for that purpose. The trust deeds securing the loan were signed by both Mr. and Mrs. McNally, the money was credited to their joint account, and paid out to contractors during the construction of the building, by authority of Mrs. McNally on certificates made by Norton. She said when she made the application for the loan that she was getting ready to put up a house on these lots, and wanted the loan to pay for the construction. She directed where the dirt taken from the excavation for the building should be taken to make a lawn; was about the building almost daily during its construction; when Prendergast applied to her husband for his first payment, she said in presence of her husband, that she was sorry they were unable to pay, and requested Prendergast to keep on with his work; on another occasion, when there was difficulty about getting brick, she asked Prendergast not to delay the building on that account, but to push it to completion, which he did; that she asked and directed divers changes to be made from the plans and specifications as to work and materials, ordered extra work done, and discussed with the architect as to whom contracts should be let for different parts of the work, at different times hurried up the workmen, and did numerous other acts and made divers statements tending to show that she was acting in her own behalf in and about the construction of the building and making the contracts with appellants, and that in so far as the business was done by and in the name of John McNally, he was acting for her.

The lots are situated at the southwest corner of Garfield Boulevard and Wright street, the corner lot having a frontage on the boulevard of 24 feet 7 $\frac{1}{2}$ inches, and the inside

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lot of 24 feet. All the contracts are made as single contracts for doing work and furnishing materials for one entire building, without attempting to divide the work, materials or compensation into two parts. The building, as planned and constructed, covers the entire width of both lots, and is 55 2-10 feet deep, is a three story structure, facing north on the boulevard, has a stone facing on both the street sides, has two stores on the ground floor and the stories above are divided into two flats on each floor, has a partition or fire wall extending through the building from front to rear, and about two feet above the roof, which is about upon the line between the two lots and built as required by the city ordinance in regard to protection from fire and for receiving and supporting the floor joists. This wall, however, about midway of the building is interrupted by a light-shaft or court about 5x9 feet, extending from the roof to the ground, with windows opening on each side down to the basement, where there is no opening, the wall being carried around this shaft on both sides and meeting again in the rear. The flats have separate entrances upon each side of the partition wall, which is 1½ feet thick at basement. After the building was completed a door was cut through this wall in the basement in order to make the operation of the steam plant, which is in the basement of the Wright street front, and used to heat the whole building, more convenient, and to afford access from one part of the building to another. The steam pipe which conveys steam to the west part of the building passes through this wall. The different parts of the building might be separated by disconnecting the steam pipe and closing the door through the fire wall. It appears from the evidence that there is a continuous roof over the porch, extending from the west line of the west lot to the east line of the east lot. No attempt is made in the evidence to apportion the claims of the several parties between the different parts of the building as divided by the fire wall.

NORTON CLAIM: The master also finds especially as to the

Norton claim, in substance, that Norton was the architect of the building, drew the plans and made several copies thereof, procured bids from contractors, let and prepared the contracts and supervised the construction of the building during a period of six or seven months; that he made his original arrangement about plans and compensation with John McNally, but as these original plans were not used there could be no recovery for them; that Norton knew that Mrs. McNally was the owner of the property, and he failed to make a case on the principle of estoppel, but that the proof was sufficient to establish that John McNally employed Norton to do what he did, and in so doing acted as the agent of Mrs. McNally; that Norton was entitled to a lien as against Mrs. McNally for \$825, less \$400 paid him, being five per cent on the cost of construction of the building, \$16,500, which was a reasonable price, less said payment; that Norton began his work about January 1, 1894, and completed it September 15, 1894; that he filed his claim for lien within the time required by the statute; that the statement of claim was sufficient, though he failed to sign the oath appended to and following his statement, the notary having certified under oath that Norton made oath that the statement and the matters and things therein stated were true in substance and in fact; that Norton, knowing of Mrs. McNally's ownership of the real estate, concealed that fact from the contractors and material men, and that this conduct on his part should in equity postpone his lien to that of all the other claimants.

PRENDERGAST CLAIM: The master finds specially as to this claim, in substance, that Prendergast had known Mr. and Mrs. McNally for seven or eight years; that he made an agreement in writing with John McNally, about January 8, 1894, with the knowledge, consent and approval of Mrs. McNally, which, as originally prepared, provided for doing the mason work of the building, including the excavation, as originally planned, covering the whole of the lots, for \$8,000; that after it was decided not to build the large building, this contract was changed as to date and amount,

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making the date February 8, 1894, and the amount to \$3,580; that at the time of making the original contract and its change, Prendergast did not know that the title of the lots, stood of record in Mrs. McNally, and that he first knew that fact in the summer of 1894, after the work was completed, and made the contract and did the work under the supposition and belief that McNally was the owner of the lots; that no specific time for the completion of the contract was provided by its terms, but that same was fully and faithfully completed, according to its terms, and work done and material placed upon said lots, within one year from the making thereof; that he, at the request of Norton, the architect, did certain extra work on the building, and furnished extra materials which amounted to the sum of \$38, for which he was entitled to a lien on the lots; that nothing had been paid to Prendergast, and that the total amount due him under the contract and for extra work and materials was \$3,618, for which, with interest at five per cent per annum from June 17, 1894, he was entitled to a lien as of February 8, 1894, on the lots; that two certificates for the full amount due Prendergast were issued to him by Norton, the architect, but that the final certificate was issued before the work was completed, and that the certificates were not to be relied on as showing the performance of the contracts; that Mrs. McNally had full knowledge of and consented to and approved of all acts of John McNally in and about the erection of the building, and conversed with Prendergast at various times with relation to his contract, without disclosing her interest in the lots, urged him on with his work, and promised to pay the amounts called for by the certificates issued to Prendergast; that Prendergast commenced work on the building about the middle of February, 1894, completed the original contract about May 17, 1894, and the extra work about May 19, 1894; that Prendergast, prior to filing his bill in this case, began a suit at law against McNally for the same debt for which he claims a lien in this case, and also filed a statement for lien for the same debt against McNally and

against the same lots on June 23, 1894, which, it is claimed, was a bar to the enforcement of any lien in this case; that his claim for lien in this case was filed in compliance with the statute, September 15, 1894, which was within four months of the time when the last payment was due, thirty days after the completion of the work, under the terms of the contract; that Prendergast's statement for lien was sufficient, under the statute, though it failed to show a specific date for the completion of the work, merely stating the work was done and material furnished between certain dates in 1894.

EILENBERGER CLAIM: The master finds specially as to this claim, in substance, that on February 8, 1894, Eilenberger made a contract with John McNally to do the carpenter work and furnish materials for the same on said building, as actually constructed, for \$4,275, having previously signed the same contract when it contained a provision for doing the work on the building, as originally planned, for \$8,400; that this contract provided that the work should be finished in a "reasonable time," and the first payment was to be made "within thirty days after the contract is fulfilled;" that Eilenberger commenced work under his contract on said building, and fully performed it according to its terms, completing the work on said building and said lots about July 1, 1894; that he also did extra work and furnished materials for the same by orders of John McNally (which is specifically set out in the report), aggregating \$425; that Norton, the architect, issued to Eilenberger three certificates, amounting in all to \$7,125, which is \$2,425 more than is claimed, but that these certificates are not to be relied on as showing the completion of the work, which is based on other evidence and not on the certificates; that the first certificate for the sum of \$2,500 bears the indorsement of John McNally, who paid Eilenberger thereon \$1,000 June 8, 1894; that there remains due to Eilenberger on account of his contract, and for said extra work and materials, the sum of \$3,700, with interest at five per cent per annum from August 1, 1894,

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for which he is entitled to a lien on said lots as of February 6, 1894; that Eilenberger had no knowledge or information when he made his contract or did his work that Mrs. McNally held the legal title to said lots, and that he made the contract with John McNally and did the work and furnished materials thereunder upon the faith of the supposed ownership of the lots by John McNally; that Eilenberger filed his claim for lien in accordance with the statute on October 8, 1894, and that his claim is sufficient under the law, though it states that the work was done and materials furnished from February 8 to August 15, 1894.

CLAIM OF BURKHARDT & SON: The master finds specially as to this claim, in substance, that E. Burkhardt & Son is a corporation, under the laws of this State, and engaged in business as a cut-stone contractor; that this claimant, about January 8, 1894, made a contract with John McNally to do the cut stone work for said building, as originally planned, and furnish the materials therefor, for \$4,100; that this contract was changed about February 8 to 11, 1894, the same as those of the other claimants when it was determined to build the smaller building; that the date of the contract was not changed, the amount to be paid being changed to \$2,570; that this claimant commenced work under its contract about February 22, 1894, and proceeded until about May 18, 1894, when it ceased, leaving unfinished the cleaning off of the walls and the tuck pointing, which was a part of the contract; that in all other respects the contract was performed according to its terms; that on June 18, 1894, the contract price of \$2,570 became due to the claimant, less the sum of \$1,000 theretofore paid, and less the cost of completing said unfinished work, which was worth \$30, and was done by McNally, leaving due to Burkhardt & Son \$1,540, with interest at five per cent per annum from June 18, 1894, for which it is entitled to a lien on said lots; that the amount paid this claimant was paid by Loeb & Gatzert out of the loan made to construct the building, and in consideration of such payment Burkhardt & Son executed and delivered to Gatzert, trustee, a waiver of lien on

said lots, but that said waiver did not inure to the benefit of Mr. and Mrs. McNally, it not purporting to be to them or for their benefit; that Burkhardt & Son filed its claim for lien September 17, 1894, as required by statute, and that the claim was in substantial and formal compliance with the statute; that Burkhardt & Son contracted with John McNally, relying upon his apparent ownership of the lots, and the contract was made with the full knowledge, consent and approval of Mrs. McNally; that during the progress of the work by Burkhardt & Son she inspected it, knew by whom it was done, and consulted with Henry Burkhardt, the secretary, treasurer, general manager and person charged with the practical carrying on of the business of Burkhardt & Son, as to the nature of the work and as to the work necessary to be done by him in connection with the rear porch of the building.

From an examination of the evidence reported to the court by the master, it appears that as to many of the facts found by him as hereinbefore stated, generally as well as specially, there is a conflict in the evidence, but we think when it is all fully and fairly considered with reference to many circumstances appearing, which are uncontroverted, the findings of the master as to facts are fully sustained.

The report of the Superior Court master was confirmed in so far as it found and recommended a lien in favor of Bastrup & O'Neill under their trust deed for the sum of \$3,350 and interest at five per cent per annum on \$3,000 from May 10, 1895, and fixed their lien as of May 27, 1895, and no fault is found with the decree in that regard.

On the hearing before the chancellor, and before the rendition of the decree, Prendergast, Burkhardt & Son and Eilenberger each presented to the court, and asked leave to file, amendments to the bill of Prendergast, alleging that although no specific real estate was mentioned in his contract, it was understood and agreed between him and John and Catherine McNally, that the contract referred to the premises in controversy (describing them); to the cross-bill of Eilenberger, in substance the same allegation; and to the

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intervening petition of Burkhardt & Son, in substance the same allegation, and the further allegation that John and Catherine McNally failed to perform their part of the contract, in making payments as required by the contract; that Burkhardt & Son was prevented from and refused, without its fault, to perform the cleaning down of the walls of said building, and that the cost of such cleaning down of the walls would be about \$25; but the court refused to allow said amendments, or either of them.

MASTERSON, FOWLER & HAFT, H. F., F. A. & H. F. PENNINGTON, and G. LANGHENRY, attorneys for appellants.

JAMES F. DILLON and FRANCIS J. NORTON, attorneys for appellant.

BASTRUP & O'NEILL, attorneys for appellees.

MR. JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

Appellees have moved to strike this case from the docket, because they claim a part of the record was not properly certified. The motion is inapt, and is denied. The proper motion would have been to strike from the record that portion which was claimed not to have been properly certified.

Appellees also claim that as Prendergast, Eilenberger and Burkhardt & Son were defaulted and the bill taken as confessed as to them in the foreclosure case in the Superior Court, and as Norton failed to make any proof in that court, and did not except to the Superior Court master's findings, that even if their claims for lien are allowed, they must be held to be subject to the lien of Bastrup & O'Neill. This contention, we think, is not tenable, because in the final decree it is found that the two causes were consolidated and heard as one cause (no objection being made by any of the parties), and the confession of Prendergast, Eilenberger and Burkhardt & Son was set aside, and Norton's proof of claim was made before the Circuit Court master,

who made a finding in Norton's favor, and also that all issues in said consolidated cause were made up and complete as if both were one case commenced and pending in the Circuit Court. It would have been better practice for these claimants, except Norton, to have either filed answers in the foreclosure case, setting up their claims, or had an order entered in the Circuit Court providing that their bill, cross-bill and intervening petition stand and be considered as their answers to the bill in the foreclosure case, but we think their pleadings, under the decree, are sufficient to set forth their rights, and appellees should not now be allowed an advantage because of this technicality.

Appellants, except Norton, claim that the master's findings and recommendations as to their claims should be sustained, and that the chancellor denied their liens only because no specific property was described in either of their contracts, and Norton contends the master's findings as to his claim should be sustained, except that it should not be postponed to the other liens for work and materials.

There is nothing in the record from which it can be told that the claims, except Norton's, were disallowed, because there was no description of property in the contracts on which the claims were based, the decree not showing that any specific exception to the master's report was sustained or overruled. It no doubt was a great saving of labor to the successful counsel, as well as the chancellor, to have the decree dispose of the exceptions *en masse*, as it did, instead of specifying what exceptions were sustained and what overruled, as it should have done, but such a course is of no assistance to this court, and leaves us no alternative but to examine the report, evidence and exceptions in detail, to determine, if possible, if there is any basis on which the decree may be sustained. The chancellor should in some way, in a case like this, involving the great mass of pleadings, evidence, master's reports and exceptions thereto, some 2,400 typewritten pages of record, make it clear, if possible, on what basis the decree was rendered. This generally may be done by passing upon each exception to the mas-

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ter's report separately, or by making some statement in the record of the points of his decision; either practice or both, is to be commended.

The appellants contend that the decree should be affirmed, because: 1st, the contracts, so far as they are in writing, are sealed instruments, executed by the claimants and John McNally, owner; 2d, that the agency of John McNally is not shown, nor any facts creating an estoppel as to Catherine McNally; 3d, that there are two separate buildings, and the proof and pleadings fail to show a right to separate liens; 4th, that the contracts have no reference to any particular lot of land; 5th, that the proofs do not sustain the pleadings; and 6th, that none of the claimants have complied with the statute in filing their statements of claim.

The claims of Prendergast, Eilenberger and Burkhardt & Son, all being by virtue of contracts *under seal* between them respectively and John McNally, *owner*, and there being nothing on the face of the contracts to show that they were or were not intended to be made with Catherine McNally, they can have no lien by virtue of their contracts alone. The statute of 1874, under which these liens are claimed, gives the right to a lien only where the contract was with the owner of the land. *Campbell v. Jacobson*, 145 Ill. 389, 400; *Walsh v. Murphy*, 167 Ill. 230, and cases cited.

The latter case seems to control as to these claims, in so far as they are based on the contracts alone. The court says: "The rule in regard to instruments under seal made by an agent is, that in order to bind the principal and to make it his contract, it must purport on its face to be his contract, and the seal must purport to be his. An agent can not ordinarily bind the principal by a sealed contract executed in his own name, nor can the principal ordinarily avail himself of such a contract, and sue the other contracting party thereon. An undisclosed principal, whose authorized agent has made such a contract in his behalf, can neither sue nor be sued on it." It can, therefore, make no difference that it appears from the master's report, which we

think is fully sustained by the evidence, that John McNally was the agent of his wife in making these three contracts.

The point made that the Walsh case is different in its facts from these three claims, in that it does not appear that in that case the wife, the undisclosed principal, received and accepted the benefits of a contract executed on the part of the claimant, as is shown here, can not be maintained, because it appears she was the owner of the land and sold it after the lien was claimed to have attached. The improvement made by her husband on her land became a part of it, and it must be presumed that when she sold the land she also sold the improvement upon it.

As to the remaining part of appellees' second contention, that no facts are shown creating an estoppel, reliance is had on the case of Campbell v. Jacobson, *supra*. The pleadings in that case were not framed on the theory of estoppel, and the court held for that reason, and because the wife was not shown to be guilty of any fraudulent act, her mere non-action, standing by and permitting her husband to put up buildings on her lots, not positively forbidding him, nor taking legal means to prevent his doing so, but having no knowledge that he was holding himself out to be the owner, when she had given notice to all the world by placing her title on record, did not make a case of estoppel.

The pleadings of Prendergast, Eilenberger and Burkhardt & Son all allege, in substance, that their contracts were made with John McNally in the belief that he was owner (and the contracts state that he was owner); that Mrs. McNally had full knowledge of, consented to, and approved of, all his acts and doings with reference to the making of the contracts and the construction of the building, and that they had no knowledge that she was in fact the owner until after their work was done and materials furnished, and that they relied upon the assumption of ownership by John McNally. It is true, they did not ask who was owner, and did not examine the records. They were justified in not doing so when McNally by his contracts said he was owner, and his wife knew all he was doing about letting the contracts, saw

the contracts, and did the numerous acts found by the master, tending to show that she gave her entire approval to all her husband did. The preponderance of the evidence supports these allegations in their pleadings, and the master so found in substance. The Supreme Court said in the Campbell case, *supra*, speaking of the acts of the wife, "if she had fraudulently permitted her husband to represent himself as such owner, as appeared in the case of Oglesby Coal Co. v. Pasco, 79 Ill. 170, the case would doubtless have been different," thus clearly intimating that though the contract was under seal, her fraud would estop her.

In Anderson v. Armstead, 69 Ill. 454, the court said: "The law is familiar, that where the owner of property holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent parties are thus led into dealing with such apparent owner, or person having the apparent power of disposition, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing as against them, the existence of the title or power he caused or allowed to appear to be vested in the party, upon the faith of whose title or power, they dealt. * * * It is an evident proposition, that a husband can not, with the connivance of the wife, commit a fraud upon another for the purpose of presenting her with the proceeds of the fraud, for their future use and enjoyment." This language was used in a case where the wife was owner and allowed her husband, with her knowledge and consent, to make a contract with a painter to furnish materials and paint her house. The contract was performed and she was held to be estopped from denying that the contract was hers though made with her husband. She, it is true, held a deed for the lot, on which the house was, that was not recorded until four days after the contract, but the case, in principle we think, is applicable to the case at bar. So far as concerns the doctrine of estoppel, we see no reason for a

different rule in case of sealed instruments from that of simple contracts. A court of equity should no more permit a fraud to be perpetrated under the guise of a sealed contract, than it would when the contract is verbal or in writing, but not under seal. See also *Higgins v. Ferguson*, 14 Ill. 269; *Schwartz v. Saunders*, 46 Ill. 18-24; *Paulson v. Manske*, 126 Ill. 78; *Henderson v. Connelly*, 132 Ill. 103; *Baumgartner v. Hall*, 163 Ill. 136. We think the work having been done under one entire contract, as to each of the appellants, and without reference to any particular part of the building as distinct from the other, the porch roof extending as a continuous roof across both lots, and the whole building heated by one steam plant, it constituted one improvement, and it was unnecessary that the claims for liens should be divided between the two lots. We think the intention as indicated by the contracts, plans, and the building, as actually constructed, make the improvement an entirety. The case of *Moore v. Parish*, 163 Ill. 93-100, we consider controlling on this point. See also *Orr v. N. W. Mutual Life Ins. Co.*, 86 Ill. 260; *Peck v. Standart*, 1 Ill. App. 228; *Berndt v. Armknecht*, 50 Ill. App. 467-9. Appellees *Bastrup & O'Neill* would in no way be prejudiced by entire liens as their lien is an entirety on both lots.

It is not essential that the written contracts should describe any specific piece of property. The proof shows clearly, and the master found, that the contracts were made with reference to the construction of a building upon the lots in question, and that the work was done and materials furnished on the building on the same lots. 2 *Jones on Liens*, Sec. 1327, p. 302; *Burns v. Lane*, 23 Ill. App. 504; *Power v. McCord*, 36 Ill. 214; *Clark v. Manning*, 90 Ill. 380.

There may be some question as to whether the pleadings were sufficient in this regard, but appellants asked leave to file amendments in this respect, which amendments should have been allowed by the court.

What has been said disposes of the fifth claim of appellees, that the proofs do not sustain the pleadings.

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As to the sixth contention, that none of the claimants have complied with the statute in filing their statements of lien, the facts in this respect are above set out in the master's findings, and we think all the statements are a substantial compliance with the statute in reference to claims for lien and that appellants should not be denied their liens because of the technical objections made to them by counsel.

The objection made that the statement of lien by Norton is not sufficiently verified and claims too much, is, we think, overcome by the following cases: *Millers v. Schofer*, 3 Denio, 60; *People v. Southerland*, 81 N. Y. 1; *Langston v. Murphy*, 31 Ill. App. 190; *Scherman v. Pitcher*, 36 Ill. App. 45; *Cooper v. Payne*, Id. 156; *Hayes v. Hammond*, 162 Ill. 133-7.

Under the holdings of the Supreme Court in *Campbell v. Jacobson*, *supra*, *Springer v. Kroeschell*, 161 Ill. 365-8, and *Hayes v. Hammond*, 162 Ill. 136, that a substantial compliance with the statute in the filing of the statement of claim for lien is sufficient, we are of opinion that the objections urged against the statements of Prendergast, Eilenberger and Burkhardt & Son, are not tenable.

The findings of the master as to the claim of Norton being, as we have said, sustained by a clear preponderance of the evidence, his claim should have been allowed, but not postponed to that of the other lien claimants, as recommended by the master, because of his not making known to them the condition of the title of the lots, which he knew at the time they made their contracts with McNally. We can not, in this proceeding, purely statutory as it is, consider the question of general equities as between the different claims for liens.

Since the submission of this case, the parties having stipulated that the several amendments in appellant's pleadings mentioned in this opinion be by this court considered as made, and the issues on the pleadings as thus amended, be considered as made, and appellees having waived and released all error in all courts concerning such pleadings, and the sufficiency thereof, and all questions of vari-

ance between the allegations and proofs, the decree of the Circuit Court is reversed, with directions to enter a decree in accordance with the prayer of the pleadings of all the appellants, as thus amended, for the amounts found due them, and of the dates respectively, as found by the Circuit Court master.

And it is further directed that the costs be taxed against the appellee, Catherine McNally. Reversed with directions.

76 356
177 346

**Frank Schuberth, Mary Schuberth and George F.
Schuberth v. Adam Schillo.**

1. **HUSBAND AND WIFE—Preferred Creditors.**—Where the husband undertakes to prefer his wife to the exclusion of other creditors, the proof should be clear and satisfactory that the wife has a valid subsisting debt which is to be enforced and payment exacted regardless of the fortune or misfortune of the husband.

Bill to Cancel a Conveyance, etc.—Tried in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Hearing and decree for complainant. Appeal by defendants. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

A. S. ROBERTSON, attorney for appellants.

The wife stands precisely like any other creditor of the husband under existing laws of this State, and that he has the right to prefer her to them if done in good faith, is sustained by the following authorities: *Whitford v. Daggett*, 84 Ill. 144; *Van Dorn v. Leeper*, 95 Ill. 35; *Tomlinson v. Mathews*, 98 Ill. 178.

“Fraud is never presumed where transactions may be fairly reconciled with honesty, and if the weight of evidence is in favor of that conclusion it should always be adopted.” *Mey v. Gulliman*, 105 Ill. 285.

“The burden is on the creditor attacking a sale to establish the fraud—and fraud must be shown by at least a

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preponderance of the evidence." *Schroeder v. Walsh*, 120 Ill. 407.

"The fraudulent intent in such a case" (where a debtor sells his property to pay a debt or to purchase necessities for himself) "is always a question of fact to be established by extrinsic proof, and fraud is not to be presumed when, under the evidence, the transaction may be fairly reconciled with honesty." *Dempsey v. Bowen*, 25 Ill. App. 192.

ARNOLD TRIPP, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This was a bill filed by Adam Schillo, appellee, against Frank Schuberth, Mary Schuberth and George F. Schuberth, appellants, alleging fraud in certain conveyances made by Frank and Mary Schuberth to George F. Schuberth, and by George F. Schuberth to Mary Schuberth, of the premises hereinafter described, and praying that the same be set aside, and that a judgment of appellee against the appellant Frank Schuberth, hereinafter mentioned, be declared a lien on said premises, and for further relief. Issues were made up by answer of appellants to the bill and replication to the answer, and the cause was referred to a master to take proofs and report the same with his conclusions thereon. Subsequently, and prior to a report being made by the master, he, the master, was appointed special commissioner in the cause, and an order was entered in the cause that the reference of the cause to the master, as master, should stand as a reference to him as special commissioner. The special commissioner reported the evidence, with his conclusions therefrom. His conclusions are as follows:

"1. That on October 21, 1895, the complainant obtained a judgment against the defendant, Frank Schuberth, in the Superior Court of Cook County, Illinois, for the sum of \$1,457.23; that on that day an execution, issued upon said judgment, for said sum, was placed in the hands of the sheriff of Cook county to execute, and that said sheriff on

October 21, 1895, returned said execution ‘No property found and no part satisfied.’

“2. That the said judgment remains in full force and effect, unsatisfied in whole or in part, and that there is due to the complainant upon said judgment the sum of \$1,470, with interest thereon since October 21, 1895.

“3. That the debt for which said judgment was rendered was due and owing from Frank Schuberth to the complainant on and prior to August 7, 1895.

“4. That on August 7, 1895, Frank Schuberth was the owner of the following described real estate, situated in the county of Cook and State of Illinois, to-wit: Lots 1 and 2 in Stickney’s subdivision of lot 13, in Metyler, Peck and Hunter’s subdivision of the west one-half of block 17 in Canal Trustees’ subdivision of the east half of section 29, township 40 north, range 14, east of the third principal meridian, and that on said day he, with Mary Schuberth, his wife, made, executed and delivered to George F. Schuberth a warranty deed conveying the said premises to said George F. Schuberth for an expressed consideration of \$4,000; and that on the said date the said George F. Schuberth made, executed and delivered to Mary Schuberth a certain deed wherein he conveyed to said Mary Schuberth an undivided one-half of said premises for the expressed consideration of \$2,000.

“5. That both deeds were executed and delivered at the same time, and were one and the same transaction, and that no consideration was at the time paid by either grantee.

“6. That it is claimed by the defendants that the conveyance to George F. Schuberth was made in consideration of various sums of money loaned to the said Frank Schuberth by said George F. Schuberth, as follows:

| | |
|--------------------|--------|
| Jan. 22, 1886..... | \$ 150 |
| May 20, 1887..... | 100 |
| Nov. 18, 1888..... | 250 |
| Nov. 26, 1889..... | 300 |
| July 5, 1890..... | 300 |
| Sept. 4, 1891..... | 350 |

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| | |
|---------------------|--------|
| Dec. 17, 1892..... | \$ 400 |
| Sept. 25, 1893..... | 350 |
| Feb. 6, 1894..... | 300 |
| Jan. 2, 1895..... | 200 |
| June 20, 1895..... | 150 |

Total..... \$2,850

“And that the consideration for the conveyance from George F. Schuberth to Mary Schuberth was for money loaned by Mary Schuberth to Frank Schuberth, as follows:

| | |
|--------------------|--------|
| July 15, 1874..... | \$ 250 |
| Feb. 20, 1876..... | 200 |
| Mar. 12, 1891..... | 600 |
| Oct. 6, 1891..... | 250 |
| Aug. 10, 1891..... | 250 |
| Jan. 7, 1892..... | 150 |
| Aug. 6, 1893..... | 260 |

Total..... \$2,060

“7. The special commissioner finds ‘that said money was loaned or paid by the said parties to the said Frank Schuberth as next hereinbefore set forth, but that no note was ever given for items of indebtedness, nor was ever any interest paid thereon, nor was any time mentioned or agreed upon between the parties when said money should be repaid, nor was anything ever done, either by the said George F. Schuberth or the said Mary Schuberth, during all the years Frank Schuberth owed said money, to enforce payment of the same or to secure the payment of same. The record also fails to show that at the time of execution of the deeds hereinbefore set forth, on the 7th day of August, 1895, that the same was done at the request of the said George F. Schuberth, or Mary Schuberth; neither does it appear from the evidence that at that time, or at any time prior thereto, the said Mary Schuberth or the said George F. Schuberth pressed the said Frank Schuberth for the payment of the indebtedness aforesaid.’

“8. The special commissioner further finds ‘that under such circumstances, the conveyances aforesaid were not in

good faith to secure a valid *bona fide* debt, but were made for the purpose of placing the property beyond the reach of the creditors of said Frank Schuberth, and as such the conveyances are fraudulent.'

"9. The special commissioner further finds 'that, as a matter of law, a debtor in failing circumstances may prefer one creditor to the exclusion of others when he does so in good faith for a valuable consideration, and the wife may be preferred by the husband, if she is a *bona fide* creditor and the conveyance is made in good faith and based upon a valuable consideration. Where, however, the husband undertakes to prefer the wife to the exclusion of other creditors, the proof should be clear and satisfactory that the wife has a valid and subsisting debt, which is to be enforced and payment exacted regardless of the fortune or misfortune of the husband.' From the evidence in this case does 'not find that the indebtedness between Frank Schuberth and Mary Schuberth, and between Frank Schuberth and George F. Schuberth was of such a character;' therefore, finds that the material allegations of the bill of complaint have been proven, that the equities of this cause are with the complainant and recommends that a decree be entered in accordance with the facts and the prayer of the bill of complaint."

Exceptions were filed by appellants to the report, on which, and the report, a hearing was had, and the court found that the conveyances described in the report were fraudulent, and decreed that they should be set aside, etc., as prayed by the bill. The exceptions only go to the commissioner's conclusions as to the rights of the parties, and to his conclusion that the conveyances were not made in good faith, and were fraudulent as to appellee.

Appellants' counsel contend that each of the conveyances in question was made for a valid consideration, and was not fraudulent as to appellee. George F. Schuberth is the son of Frank and Mary Schuberth, and has always lived with his parents, and was living with them on the premises in question when the conveyances were made. The sums of money which he let his father, Frank Schuberth, have,

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aggregating \$2,060, and in consideration of which it is claimed the conveyance from Frank and Mary Schuberth was executed to him, were loaned or paid to Frank Schuberth from July 15, 1874, to August 6, 1893, both dates inclusive. No notes had ever been given or requested for any of said sums, nor had any demand been made by George F. Schuberth for payment, and, at the time of the execution of the conveyance to George F. Schuberth the statutes of limitation had run against two of said sums, viz., \$250 advanced July 15, 1874, and \$200 advanced February 20, 1876.

The sums claimed by appellants to have been loaned by Mary Schuberth to her husband, Frank Schuberth, were loaned by her from January 22, 1886, to June 20, 1895, both dates inclusive, and no notes were given or requested for said sums, or any demand made for payment of any of them.

The statute of limitations had run against five of the sums claimed to have been loaned by Mary Schuberth, at the time of the execution of the conveyances, viz., the sums claimed to have been loaned January 22, 1886, May 20, 1887, November 18, 1888, November 26, 1889, and July 5, 1890, aggregating \$1,100.

Although there is evidence that the parties to the conveyances were all present when the conveyances were made, we agree with the finding of the commissioner, that there is no evidence that either of the grantees, Mary Schuberth and George F. Schuberth, requested a conveyance. Neither does it appear that either of them requested any security whatever.

John H. Fletcher, agent for appellee, testified that in July or August, 1895, and before the recording of the conveyances in question, he called on Frank Schuberth and had several conversations with him in respect to the indebtedness for which the judgment in favor of appellee was subsequently rendered. Frank put him off from time to time, saying he need not be anxious, that he had enough property, etc., and, finally, about three or four weeks after the conveyances were recorded, gave him a judgment note for the indebtedness.

We are of the opinion that the finding of the Circuit Court that the conveyances were not made in good faith, but, on the contrary, were made for the purpose of hindering and delaying appellee in the collection of the debt due him from appellant Frank Schuberth, and to avoid the lien of any judgment which appellee might recover, is fully warranted by the facts proven. In *Frank v. King*, 121 Ill. 250, the court say: "When the husband undertakes to prefer the wife to the exclusion of other creditors, the proof should be clear and satisfactory that the wife has a valid subsisting debt—one which is to be enforced and payment exacted, regardless of the fortune or misfortune of the husband. Such was not the character of this debt. A party who has a valid claim against another, does not, as a general rule, suffer the claim to stand for a period of twelve years without even taking a note, without calling for interest, and without security, doing nothing whatever to collect or secure the claim. Such is not the manner in which business is done when a valid *bona fide* debt is in existence."

The decree of the Superior Court will be affirmed.

A. E. Rouse et al. v. Emily R. Calvin.

1. **BANKS AND BANKING**—*Transfer of Deposit by Checks*.—The check of a depositor upon his banker transfers to the payee the title to so much of the deposit as the check calls for, provided, the depositor has funds to that amount on deposit, subject to his check at the time it is presented.

Bill of Interpleader.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Decree. Appeal by the unsuccessful party. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

STATEMENT.

This suit was begun by a bill of interpleader filed by the Illinois Trust & Savings Bank, which made appellants,

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appellee, and the receiver of the Climax Cycle Company, parties defendant. The bill sought to have determined the rights of the defendants to a fund of \$442.78 held by the Illinois Trust & Savings Bank.

On June 23, 1896, the appellants sent their check for the sum of \$412 to the Climax Cycle Company, which was then engaged in the manufacture of bicycles, to pay for certain goods, an order for which accompanied the check. The goods were never delivered, but the check was retained by the Climax Cycle Company and deposited by it with the Illinois Trust & Savings Bank, and on June 29, 1896, the check having been collected, the amount thereof was credited by the Illinois Trust & Savings Bank to the deposit account of the Climax Cycle Company. On June 22, 1896, the Climax Cycle Company gave its check for \$443 on the Illinois Trust & Savings Bank to one Goldfinger, in part payment of what is admitted to have been a *bona fide* indebtedness. This check was afterward sold, indorsed and delivered by Goldfinger to appellee.

On June 26th an order was entered by the Superior Court of Cook County, appointing the Chicago Title & Trust Co. receiver for the Climax Cycle Company, and directing that all the property of the Climax Cycle Company be transferred to such receiver.

The check of appellant for \$412 was not collected and credited to the account of the Climax Cycle Company, nor was the check of the Climax Cycle Company for \$443 presented for payment by appellee until after this appointment of the receiver.

On June 22, 1896, when the check for \$443 was given to Goldfinger, the Climax Cycle Company had no balance on deposit to exceed \$50, but afterward, and after the appointment of the receiver, its balance was increased to the sum of \$442.78, by the credit of the \$412 check received from appellants.

In the court below each of the defendants made claim to this balance in part or in whole. Appellants claimed that by reason of the failure of the Climax Cycle Company to

deliver the goods ordered, and the subsequent appointment of a receiver for its property, the check sent with the order either remained or became again the property of appellants, and the amount of the same, viz., \$412, was held in trust by the Illinois Trust & Savings Bank for appellants. Appellee claimed that the check given Goldfinger, and by him assigned to her, for \$443, although not presented for payment until after appointment of the receiver, and although the balance of the drawer on deposit never amounted to \$443 after the giving of the check, yet operated to effect an assignment to her of the \$42.78 on deposit when the check was presented. The receiver claimed that the order appointing it as receiver operated to transfer to it the right to this fund, against which no check had been presented prior to the appointment. The court decreed that appellee was entitled to the fund. From such decree appellants have prosecuted this appeal. The receiver does not join in the appeal.

EDWIN A. MUNGER, attorney for appellants; WARWICK A. SHAW, of counsel.

BLUM & BLUM, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The receiver was entitled to the fund in question. On June 26, 1896, the date of the receiver's appointment, the fund of \$422.78 was, to the extent of \$412, the amount of appellants' check, in the hands of the Illinois Trust & Savings Bank, and in course of collection for the Climax Cycle Company; and to the extent of \$10.78 was a balance of the deposit account of the Climax Cycle Company in the bank. It was all the property of the Climax Cycle Company on June 26, 1896, and by virtue of the order of the Superior Court of that date became transferred to the receiver.

Appellants were not entitled to the amount of this fund represented by their check, for the payment by them to the

Climax Cycle Company is not shown to have been obtained by fraud and can not be rescinded merely by reason of the subsequent receivership. The transaction, sending check and ordering goods, created a liability on the part of the Climax Cycle Company to appellants, and that liability still exists, but it can not be thus enforced as against this specific fund. They can not go upon this particular fund to the prejudice of other general creditors, to satisfy a claim, whether it be for money had and received or for damages for a breach of contract. Appellee was not entitled to the fund, for her check, being for a sum larger than the balance which the drawer had on deposit, did not operate to transfer such amount as was on deposit. *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154.

Neither did it operate to transfer any amount until presentation. *Pabst Brewing Co. v. Reeves, supra*; *Greenebaum v. Am. T. & Sav. Bank*, 70 Ill. App. 407.

In the former case the court said: "The rule in this State is that the check of a depositor upon his banker transfers to the payee the title to so much of the deposit as the check calls for, provided the depositor has funds to that amount on deposit, subject to his check at the time it is presented."

It was not presented until after the order appointing the receiver had operated to transfer the balance of the Climax Cycle Company in the bank to the receiver.

If, therefore, the receiver had joined in this appeal, or if the assignments of error were broad enough to permit appellants, as a general creditor, to insist upon the receiver's rights, we would be obliged to treat the decree as erroneous. But the receiver does not appeal. And it is not assigned as error that the court erred in not decreeing that the receiver was entitled to the fund. We can not grant relief which is not sought, nor can we act upon errors not complained of.

The only errors assigned are, in effect, that the trial court erred in not decreeing that appellants were entitled to the fund. In this there was no error.

In so far as the decree finds that appellants are not entitled to the fund in question, it is affirmed.

Maria Kornazsewska v. West Chicago St. R. R. Co.

1. **INSTRUCTIONS—Disregarding the Evidence of an Impeached Witness.**—An instruction which tells the jury that if they believe from the evidence that any witness who has testified in the case has been successfully impeached, they are at liberty to disregard all the evidence of such witness except in so far as it is corroborated by other credible evidence or by facts and circumstances, as shown by the credible evidence in the case, is erroneous.

2. **SAME—Not to be Misleading.**—The instruction in this case which states that cities and villages are by law primarily charged with the duty of keeping their streets reasonably safe and free from obstructions, and this is a duty which the city of Chicago in this case can not delegate to any one else, nor can it shift such responsibility or duty to the defendant, the West Chicago Street Railroad Company, except upon its tracks and right of way, is erroneous, as calculated to mislead the jury, after the suit had been dismissed as to the city of Chicago.

3. **SAME—Must Not Assume the Existence of Controverted Facts.**—The instruction in this case which tells the jury that although the defendant was negligent, and others were also negligent, if they are unable to determine which of the acts of negligence was the direct cause of the accident, they should find for the defendant, is erroneous, as it assumes that it may have been caused by either the defendant or the others, when the evidence would justify a finding that it was the result of their joint act, in which case the defendant would be liable.

4. **CREDIBILITY OF WITNESSES—Exclusively for the Jury.**—The credibility of a witness is a matter exclusively for the jury and no instruction should intimate that they may disregard the evidence of a witness because they may believe he has been impeached.

5. **WITNESS—When He Can Not be Discredited.**—A witness can not be discredited simply on the ground of an erroneous statement; it is only where the statements of a witness are willfully and corruptly false in regard to some material fact that the jury are authorized to discredit his entire testimony.

6. **EVIDENCE—Photographs to be Preserved in the Record.**—In order to assign error upon the ruling of the trial court upon the admission of a photograph in evidence, such photograph must be preserved in the record.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant. Plaintiff appeals. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed May 9, 1898.

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| 76 | 366 |
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| 76 | 366 |
| 196s | 172 |

Kornazsewska v. West Chicago St. R. R. Co.

CASE & HOGAN and MUNSON T. CASE, attorneys for appellant.

ALEXANDER SULLIVAN, attorney for appellee; E. J. McARDLE, of counsel.

MR. JUSTICE WINDES delivered the opinion of the court. Appellant was injured February 11, 1895, by being thrown from a sleigh, driven, and in which she was riding, along Milwaukee avenue, between Jane and Division streets, Chicago, the sleigh being tipped over because of a great accumulation of snow and ice along Milwaukee avenue at this place between the southerly sidewalk and the tracks of appellee, on the avenue. The suit was brought against appellee and the city of Chicago, and the negligence alleged is that appellee carelessly and negligently shoved and shoveled a large quantity of snow and ice in a large pile upon Milwaukee avenue at the point aforesaid, and took no steps to remove the same; that said obstruction in its nature was an impediment to travel.

After the jury was impaneled the suit was discontinued as to the city. The trial resulted in a verdict and judgment for appellee, from which an appeal was taken.

The evidence as to the cause of the accident, whether from an accumulation of snow and ice in the space between the tracks of appellee and the sidewalk (which was about twelve feet), caused by appellee cleaning its tracks with a snow plow which shoved the snow into this space, or caused by merchants and other persons along the avenue clearing the sidewalk of snow by shoveling it into the same space, and by shoveling paths and wagon ways through the snow thus accumulated so as to make a better means of access from the street to the sidewalk, was conflicting, and we think, from a careful examination of it, the jury would have been justified in finding that the accumulation of ice and snow, which resulted in the sleigh being upset, was caused either by appellee or the merchants and other persons along the avenue, or by the combined action of both.

We do not think that it clearly appears, as contended by appellee, this accumulation was caused by the merchants and others along the avenue; but that the question was one which should have been submitted to the jury; that the trial court did not err in leaving the question to the jury, and that the verdict should stand if the jury were rightly instructed.

No instructions were asked by plaintiff. Appellant claims that the court erred in giving the 7th, 8th, 11th, 12th, 13th and 14th instructions asked for defendant. They are:

“7. The jury are instructed that it is their duty to consider the case in all its bearings, the same as they would a case between two private citizens, instead of a case in which the defendant is a corporation. Corporations are just as much entitled to fair and unprejudiced treatment in courts of law as individuals would be under like circumstances. Hence the jury are instructed that it is their duty to consider the evidence in this case without prejudice, and to base their verdict upon the evidence and the instructions of the court regardless of all else.

“8. The court instructs the jury that if they believe from the evidence that any witness who has testified in the case has been successfully impeached, then the jury are at liberty to disregard all the evidence of such witness except in so far as it is corroborated by other credible evidence or by facts and circumstances as shown by the credible evidence in the case.

“11. The jury are instructed that it was the duty of the city of Chicago and not of the defendant, the West Chicago Street Railroad Company, to remove the accumulations of snow and ice, if any, which had become lodged between the defendant's tracks and right of way and the sidewalk, at the time and at the place when and where the accident complained of occurred. So if the jury believe from the evidence that the plaintiff was injured by reason of an accumulation of ice and snow in the street outside of defendant's tracks and right of way, and that such accumulation of snow and ice at the time and place in question was the

Kornazsewska v. West Chicago St. R. R. Co.

cause of the accident, then the jury should find the defendant not guilty [unless you further find from the evidence that such accumulation of snow and ice was caused by the defendant.] Part of instruction between brackets added by the court.

“12. The jury are instructed that cities and villages in this State are by law primarily charged with the duty of keeping their streets reasonably safe and free from obstructions, and this is a duty which the city of Chicago in this case can not delegate to any one else nor can it shift such responsibility or duty to the defendant, the West Chicago Street Railroad Company, except upon its tracks and right of way.

“13. The court instructs the jury that even though they believe from the evidence that the defendant, the West Chicago Street Railroad Company, was negligent in pushing or throwing the snow off of its tracks and right of way into the street, by the use of snow plows and sweepers, at the time and place where the accident complained of in this case occurred; and if the jury further believe from the evidence in this case that certain storekeepers or other persons at the time and place in question, did shovel snow and ice off from the sidewalk into the street, and did make paths between the sidewalk and defendant's tracks and right of way by throwing the snow and ice to either side out of such paths, thereby making piles of snow and ice between such sidewalk and defendant's right of way at the time and place in question, and if the jury after considering all the evidence in the case are unable to determine which of the acts above described was the direct cause of the accident complained of, then the jury should find the defendant not guilty.

“14. The jury are instructed that the defendant, the West Chicago Street Railroad Company, had no jurisdiction or control over that part of the street outside of its tracks and right of way, and could in no manner regulate and control the action of storekeepers or other persons; and could not prevent them from shoveling the snow off from the;

sidewalk or from making paths through the snow and throwing the snow into piles or heaps upon the street outside of its tracks and right of way. And if the jury believe from the evidence that certain storekeepers or other persons did at the time and at the place where the accident to the plaintiff happened, shovel snow and ice from the sidewalk out into the street, and did shovel paths in the snow and ice, throwing it to either side, making piles of snow and ice in the street outside of the defendant's tracks and right of way at the place in question, and at the time in question, and that such accumulations or piles of snow and ice were the cause of the accident complained of, then the jury should find the defendant not guilty."

The seventh instruction may be said, as counsel claim, to imply that corporations do not get the same fair and unprejudiced treatment that individuals do, but we do not think that this implication is such error as would be ground for a reversal.

The eighth instruction was erroneous, in that it tells the jury that if the witness has been successfully impeached, they are at liberty to disregard all his evidence except in so far as it is corroborated, etc. If a witness has been impeached, whether by incredible statements, contradictions in his evidence, by witnesses as to his reputation for truth, or in any other way, such impeachment goes to the weight or credit to be given his evidence, of which the jury must be the judges; but we do not think it has ever been held that a jury will be justified in disregarding all the evidence of a witness unless they believe he has willfully sworn falsely to some material matter in issue, and then all his evidence should not be disregarded if corroborated by other credible evidence. The jury should carefully consider and weigh all the evidence of each and every witness and disregard no item of evidence of a witness because they may believe from the evidence that the witness has been impeached, or successfully impeached, to use the language of the instruction, if that means any more. The credibility of the witnesses is a matter exclusively for the jury, and no instruction

should intimate, as this one does, that the jury may disregard the evidence of any witness because they may believe he has been impeached. In *Otmer v. People*, 76 Ill. 152, it is said: "The court should leave the jury perfectly free and untrammelled to pass upon the credibility of each witness, and to determine for themselves the weight to be given to his evidence." In *Pope v. Dodson*, 58 Ill. 365, in which the court instructed if a witness "has sworn falsely in any material statement," the jury might disregard his entire statement except so far as it was corroborated, the Supreme Court said: "A witness can not be discredited simply on the ground of an erroneous statement; it is only where the statements of a witness are willfully and corruptly false in regard to material facts that the jury are authorized to discredit the entire testimony. The most candid witness may innocently make an incorrect statement, and it would be monstrous to hold that his entire testimony, for that reason, should be disregarded."

In *Gulliber v. People*, 82 Ill. 146, the court said, speaking of an instruction which stated that if the jury believed a witness had been contradicted on a material point, then the jury had a right to disregard his whole testimony, unless corroborated by other testimony: "The mere fact, however, that he is contradicted as to some material matter, is not enough to warrant the rejection of his evidence altogether, unless the jury believe that, as to the matter in which he has been thus contradicted, he has sworn falsely and knew his evidence was false." *Swan v. People*, 98 Ill. 612, and *Hoge v. People*, 117 Ill. 45, are to the same effect.

We think the twelfth instruction was calculated to mislead the jury, because the case had been discontinued as to the city, and the jury might reasonably infer from the instruction that the court meant that appellee was not liable in case the obstruction was outside of its tracks and right of way. This may have been the basis of the verdict.

The thirteenth instruction is erroneous, in that it tells the jury that although appellee was negligent and the storekeepers and others were negligent, if they were unable to

determine which of the acts of negligence was the direct cause of the accident, then they should find for appellee. This assumes that the accident may have been caused by either appellee or the others, whereas we have seen that the evidence would justify a finding that it was the result of their joint acts. If the latter be true, then appellee is liable. *Pullman Palace Car Co. v. Laack*, 143 Ill. 261, and cases cited.

We think there was no error in the eleventh and fourteenth instructions.

It is also claimed the court erred in sustaining an objection to a question asked one of plaintiff's witnesses on being handed a photograph, by which he was requested to state whether it correctly represented the condition of the snow and ice at the place and time in question. The photograph is not in the record, nor was there any offer made by counsel to show by the witness that he knew anything about it, nor that it did in fact correctly represent the condition of the snow and ice at the time and place in question. We can not tell, in the absence of the photograph from the record, nor without some offer by counsel to show what it was, whether the court erred or not in its ruling. *Clifford v. Drake*, 110 Ill. 135; *Howard v. Tedford*, 70 Ill. App. 660, and cases cited; *Berkowsky v. Cahill*, 72 Ill. App. 101, and cases cited.

For the errors noted the judgment will be reversed and the cause remanded.

John Rawle v. Arnold P. Gilmore.

1. **ARCHITECT'S CERTIFICATE—*Refusal to Issue.***—The mere refusal by an architect to issue his certificate upon grounds known to be fictitious and without foundation, may be found by a jury to constitute a fraudulent refusal, and it is for the jury to determine whether the refusal is so far ungrounded and capricious as to be no bar to the contractor's right to payment.

2. **WAIVER—*Of Statement Under the Mechanic's Lien Act.***—A failure

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to comply with the statute requiring a statement under oath of the number and names of sub-contractors, mechanics or workmen, etc., with amounts due them, etc., as required by section 85 of the mechanic's lien act of 1887, will bar a right to recover in assumpsit for the labor or material as well as the right to enforce a lien, but the owner's right to such statement may be waived so as to permit a recovery in an action at law without the furnishing of the statement.

8. *SAME—Evidence to be Submitted to the Jury.*—If there is evidence tending to show a waiver of an owner's right to a statement, under the mechanic's lien act, from which a jury would be warranted in finding that there was in fact such a waiver, the issue should be left to the jury for its determination.

Assumpsit, for a balance due on a contract. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed May 9, 1898. Rehearing denied June 2, 1898.

STATEMENT.

This was an action at law, brought by appellant, a cut stone contractor, to recover an amount claimed to be due as balance upon a contract to furnish cut stone for a building of appellee. There was a written contract, by which it was provided that appellant should furnish the stone, etc., and that his work should be entirely completed by a date fixed. It also contained the customary provisions to the effect that payments should be made upon the architect's certificates as to amount due, etc., and that all questions as to damage, allowance for extras, etc., should be left to the decision of the architect as arbitrator. A penalty of \$50 per day was provided for delay on the part of the contractor "for each and every day the completion of the building is delayed."

Appellant claimed a balance due of \$2,100 upon contract and for extras. Appellee disputed the amount and claimed damages for delay. The architect tendered appellant a certificate for \$1,200 for his balance, which was refused. The architect refused to issue certificate for balance as claimed by appellant. Before this dispute arose a payment had been made upon account and a certificate issued by the architect, which was as follows:

“ \$2,000.

CHICAGO, Sept. 25, 1889.

TO DR. A. P. GILMORE:

This is to certify that John Rawle, contractor for the cut stone of ‘Erie’ building, S. W. corner of Lake Ave. & 37th, St., is entitled to a payment of \$2,000 by the terms of contract.

This certificate was issued upon an application and affidavit of the said John Rawle, dated September 25, 1889, made in accordance with the provisions of section 25 of the law relating to sub-contractors’ liens. In force July 1, 1887.

H. B. SEELY,
Architect.”

There was evidence tending to show that at the time this certificate was given all work had been finished under the contract, and only extras remained thereafter to be done. Appellant did not furnish to appellee any statement under oath, as is provided by section 35 of the mechanic’s lien act.

Upon the trial the Superior Court, at the close of appellant’s case, directed the jury to find for appellee.

WILLIAM GARNETT, JR., attorney for appellant.

GOODRICH, VINCENT & BRADLEY, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

It was contended by appellee in the trial court, as here, that the suit of appellant could not be maintained because:

1st. He had failed to obtain a certificate of the architect, a condition precedent to right of payment, as provided by the contract, and had not sufficiently excused such failure.

2d. He had not complied with the provisions of section 35 of the mechanic’s lien act.

The trial court, acting upon one of these grounds, and it would seem from the bill of exceptions to have been the second, held that appellant could not recover.

We have, then, to determine whether the jury would have been warranted by the evidence in a finding that the

facts excused appellant from obtaining the architect's certificate, as a condition precedent to payment, and also warranted in a finding that there had been a waiver of the right to demand a statement under oath, as provided by the statute.

There was evidence from which the jury might have found that the work specified in the contract was completed within the time fixed by the contract, and that there was no valid ground or reason for the refusal of the architect to give a certificate for the balance due. In such case it is for the jury to determine whether the refusal of the architect to issue his certificate is so far fraudulent, *i. e.*, ungrounded and capricious, as to be no bar to the contractor's right to payment. *Badger v. Kerber*, 61 Ill. 328; *County of Cook v. Harmes*, 108 Id. 151; *Michaelis v. Wolf*, 136 Id. 68; *Arnold v. Bournique*, 144 Ill. 132.

The mere refusal to issue the certificate upon grounds which were known to be fictitious and without foundation, might be found to constitute a fraudulent refusal. *Snell v. Brown*, 71 Ill. 133; *Foster v. Charles*, 7 Bingh. 104.

It has been held in a number of cases, that a failure to comply with the statute requiring a statement under oath of the number and names of sub-contractors, mechanics or workmen, etc., with amounts due them, etc., as provided by section 35 of the mechanic's lien act of 1887, will bar a right to recover in assumpsit for labor or material, as well as right to enforce a lien. *Gilman v. Courtney*, 158 Ill. 437; *Floyd v. Rathlege*, 41 Ill. App. 370; *Bonheim v. Meaney*, 43 Id. 532.

But it is also held that the owner's right to such statement may be waived so as to permit recovery in action at law without the furnishing of the statement. *Floyd v. Rathlege*, *supra*; *Burnside v. O'Hara*, 35 Ill. App. 150; *Morse v. Crate*, 43 Id. 514.

If there is evidence here tending to show such a waiver, and from which a jury would be warranted in finding that there was in fact a waiver, then the issue should have been left to the jury for determination.

Two facts appear in the evidence which bear upon this issue, viz.: the former certificate issued by the architect without having in fact obtained any statement under oath by the contractor; and the tender of a certificate for \$1,200 without requiring such statement. The jury might have found from the evidence that the former certificate was issued after all work had been completed under the contract. No liabilities for labor or material could then have been afterward incurred by the contractor for the work done under the contract. By its recitals the certificate admits a furnishing of the required statement at that time, although none was in fact made. This we think might support a finding by the jury that the statement had been thereby waived. The tender of the certificate for \$1,200 might be held, as a matter of fact, to have constituted a waiver to any statement, at least as to a right to payment of the \$1,200. Nor do we think the contention tenable that by refusal of the tender the waiver was necessarily thereby withdrawn.

The effect of each of these items of evidence presented a question for the determination of the jury, and should have been submitted to them. The judgment is therefore reversed and the cause remanded.

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177* 331

Marvin P. Alford, Adm'r, v. Henry Dannenberg.

1. CONTRIBUTORY NEGLIGENCE—*A Question of Fact.*—The question as to whether a person suing for personal injuries was guilty of contributory negligence is one of fact for the determination of the jury in this case.

2. VARIANCE—*When to be Raised.*—The question of variance can not be raised for the first time in the Appellate Court.

3. FELLOW-SERVANTS—*Who Are, a Question of Fact.*—The question as to whether two servants in the employ of a common master are fellow-servants is one of fact for the determination of a jury in this case.

4. DAMAGES—\$2,000 *Not Excessive.*—Plaintiff was injured by the falling of a truss upon which he was working. He was confined to his house twenty weeks and afterward was sick ten weeks more; the year following was twenty-one days in a hospital; suffers pain every day; has

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expended \$400 for doctor's bills; was never sick before the accident: one physician testified he thought the injuries permanent. *Held*, \$2,000 not excessive.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff, \$2,000. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

FRANK S. WEIGLEY, attorney for appellant.

MUNN & MAPLEDORAM, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee brought suit to recover for injuries sustained by him while working as a carpenter on a shed building, in course of construction for the firm of William Wilkins & Co., near 43d and Robey streets, Chicago, the suit being against the administrator of the estate of Louis Wilkins, deceased, who was in his lifetime, and when the injury occurred, a member of said firm. He recovered a verdict and judgment for \$2,000, from which this appeal was taken.

Appellant claims that appellee's own negligence was the immediate cause of his injury; that the negligence alleged was not proven, and that the negligence, if any proven, was that of appellee's fellow-servant, and therefore there could be no recovery.

Francis F. Bruns, the manager of Wilkins & Co., contracted with Herman Schroeder, a carpenter and contractor, in May, 1892, to build an addition to a shed at the factory of Wilkins & Co. Appellee, who is also a carpenter, assisted Schroeder at the work. They used a wooden trestle or horse about the work, which had been made by Schroeder by sawing in half one he had used when working for the firm, building a shed some six months before the time of the accident. The horse was about five feet high and six feet long, made 2 x 6 legs, four feet apart at the bottom, and the top piece 4 x 4, with a board about ten inches wide on top of it, and face boards nailed on the side. Just before the accident Schroeder and appellee were using this horse,

which stood on the shed floor about six inches from the north edge, in nailing a 2 x 8 plate on top of a post. The wind was blowing hard, and Schroeder held the horse while appellee was nailing the plate. The horse had fallen down two hours before that day.

One Schwartz, who had general charge of a large number of men in the employ of, and of the business and property generally of the firm, while Schroeder and appellee were engaged as stated, called Schroeder and directed him to go to a telephone some distance away to send a message regarding some lumber. Appellee testified that he thereupon asked Schwartz who would hold the truss (the horse), and told him, "I can not work on it if nobody is holding it," and that Schwartz replied, "Best can hold it," referring to a man who was at work for the firm nailing the floor; that Schroeder then called to Best to come and hold the truss until he, Schroeder, came back; that Best came and held the horse while appellee went on with his work, and Schroeder went away; that about two minutes later Schwartz, when standing beside Best, told Best to go and assist another workman, Stohl, in some other work; that Best went away and appellee continued his work, thinking Schwartz was holding the horse, and while he was laying the plate up, nailing it and marking the joist on it, the horse fell and he was injured. When he fell he discovered that Schwartz had stepped away and was some twenty feet from the horse.

Schwartz denies that he gave Schroeder or Best any such orders or directions as testified by appellee, or any directions whatever; says that he was fifty to sixty feet away out of sight of the horse, and did not see the accident, but admits that he was close to the truss where appellee was working some twenty minutes before, and saw Best nailing the floor, also that Schroeder went to the telephone. No other witnesses testify to the immediate facts of the accident, but Schroeder swears that Schwartz gave him the direction to go to the telephone, and said that Best could hold the truss, and that when he, Schroeder, left, Best was holding the truss. We therefore think that

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whether appellee was guilty of contributory negligence was a question for the jury, and that the evidence justifies a finding that he was not.

As to whether the negligence alleged was proven, we need not now consider, as the appellant did not, before the trial court, so far as appears by the abstract, raise that question. It is too late to claim in this court, for the first time, that there was a variance. *Ry. Co. v. Ward*, 135 Ill. 511-16; *Probst Const'n Co. v. Foley*, 166 Ill. 31.

There was a conflict in the evidence as to whether appellee was employed by Schroeder or by Wilkins & Co., but we think that it justified a finding by the jury that appellee was employed by the firm, and not by Schroeder; and as to whether Schwartz, who was in general charge of the firm's men and business at the time of the accident, was a fellow servant of appellee, was a question for the jury, and the evidence, in our opinion, is sufficient to establish that they were not fellow-servants.

It is suggested, but not argued, that the damages are excessive, but we think this contention is not tenable. Appellee was confined to his house immediately following the injury for fourteen weeks. When he got out he was taken worse and was again confined to his house six weeks more, and in 1893 was sick ten weeks on account of the injury, as he says, and in 1894 was twenty-one days in a hospital, also on account of the injury, and following that was confined to his house eight weeks more. He says he suffers terrible pain right over his kidneys as soon as he works, and can now (time of the trial) do only a little light work; that his back bothers him in the daytime, and keeps him awake a good many nights if he sits up after 7 p. m.; that he has endured much pain from the injury, suffers pain every day when the weather is bad, has expended nearly \$400 for doctor's bills and medicines on account of the injury, and was never sick before the accident.

A physician who treated him and visited him forty or fifty times, testified that he thinks appellee's injuries are permanent.

The judgment is affirmed.

May, Purington & Bonner Brick Co. v. General Engineering Co. et al.

1. **MECHANICS' LIENS**—*In Derogation of the Common Law.*—The statute with regard to liens is in derogation of the common law, and is to be strictly construed.

2. **SAME**—*Statement Required by Section 4.*—The provision of section 4 of the mechanic's lien law, that the statement required to be filed shall set forth the times when the material was furnished or labor performed, is material and imperative.

3. **SAME**—*Strictness Required.*—The statute requires a true statement, verified by affidavit, of the time when the material was furnished or labor performed. A false statement of the time is fatal.

4. **SAME**—*When it Exists.*—A statutory lien can exist only when it has been perfected in the manner prescribed by the statute authorizing it.

Mechanic's Lien Proceeding.—Trial in the Circuit Court of Cook county, the Hon. OLIVER H. HORTON, Judge, presiding. Judgment for defendants and demurrer to bill. Appeal by complainants. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

COWEN & HOUSEMAN, attorneys for appellant.

"In a statement, substantial compliance with the statute is sufficient." *Towner v. Remick*, 19 Mo. App. 205.

"Mere informality is not fatal." *Knutzen v. Hanson*, 28 Neb. 595.

"Mistakes that do not tend to deceive the parties interested will be overlooked." *Cannon v. Williams*, 14 Col. 22.

To show the leniency of the courts in this regard, it has been held that an impossible date in the bill of particulars, which was apparent on its face, was also considered as no bar to a recovery, on proof to the jury of the real date of furnishing the material; it was susceptible of correction. *Hillary v. Pollock*, 13 Penn. St. 186.

"If a notice is not so defective but that averments and proofs can render it certain, such averments and proofs will cure its indefiniteness." *White v. Stanton*, 111 Ind. 540.

May, Purington & Bonner Brick Co. v. Gen. Eng. Co.

ALBERT N. EASTMAN, attorney for appellees.

“A verified statement of the time when the material was furnished is one of the statutory requirements.” O’Brien v. Krockinski, 50 Ill. App. 456 (460).

It is proper to raise this question by demurrer. Kinzey v. Thomas, 28 Ill. 502 (504 and 505).

“The original contractor can not bring suit to foreclose his lien until his claim for lien is filed as provided. McIntosh v. Schroeder, 39 N. E. Rep. 478.

“A verified statement of the time when the material was furnished is one of the statutory requirements.” O’Brien v. Krockinski, 50 Ill. App. 456.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This was a bill filed by appellant against appellee and Maria W. Sweeney for a mechanic’s lien. The original bill set up a verbal contract between appellant and appellee, February 21, 1893, for the furnishing of brick by the former to the latter for the erection of a building, on certain premises described in the bill; that, in pursuance of the contract, appellant commenced, immediately, to furnish brick, and continued so to do, as the progress of construction of the building required, until March 13, 1893; that the brick furnished was used in the construction of the building; that the building constitutes a valuable and permanent improvement of the described premises, and that there is due appellant for the brick so furnished the sum of \$304, with interest.

The bill further avers that July 5, 1893, appellant filed with the clerk of the Circuit Court a statement or claim of lien which is attached to and made a part of the bill, and which is as follows :

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“ CHICAGO, June 24, 1893.

GENERAL ENGINEERING Co., Harvey, Ill.
Bought of MAY, PURINGTON & BONNER BRICK Co.,
Brick Manufacturers,
159 La Salle Street, Room 4.

| | | | | |
|--------------|-----|-------|--------------------|-------------|
| 1893. | | | | |
| February 21, | Car | 3785 | 12 M brick at \$8, | \$ 96 |
| “ 23, | “ | 14582 | 10 | 80 |
| “ 27, | “ | 11068 | 12 | 96 |
| March 13, | “ | 272 | 14 | 112 |
| | | | | <hr/> \$384 |

F. O. B. Chicago & Calumet Terminal at works of General Engineering Co.”

“ STATE OF ILLINOIS, }
Cook County. } ss.

In the clerk’s office of the Circuit Court, Cook County.

| | |
|---|-------------------|
| MAY, PURINGTON & BONNER BRICK COMPANY v. GENERAL ENGINEERING COMPANY. | } Claim for lien. |
|---|-------------------|

B. W. May, being first duly sworn, on oath says that he is the agent of the May, Purington & Bonner Brick Company, a corporation organized and doing business under and by virtue of the laws of the State of Illinois, and that the attached Exhibit ‘A,’ is a just and true statement of the account due May, Purington & Bonner Brick Company from General Engineering Company for brick furnished said General Engineering Company at the times in said statement mentioned, which various amounts are become due and payable, and which Exhibit ‘A’ is made a part hereof; and affiant says that the brick in said statement mentioned were used in the construction and improvement of a brick office building situate upon the following described premises in the county of Cook and State of Illinois, to wit: The east three hundred and ninety-four feet of block ‘G’ of Harvey, a subdivision of that part of the west half of the west half of the northeast quarter of sec-

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tion seven (7), township thirty-six (36) north, range fourteen (14), east of the third principal meridian south of Indiana Boundary line, lying between the Chicago & Grand Trunk Railway and the Chicago Central & Calumet Terminal Railway.

And affiant says, that there is ~~now~~ due and owing to said May, Purington & Bonner Brick Company from said General Engineering Company, at whose request said material was furnished as aforesaid, after allowing to it all just credits, deductions and set-offs, the sum of three hundred and eighty-four dollars, (\$384,) for which amount said May, Purington & Bonner Brick Company claims a lien upon the above described premises.

B. W. MAY.

Subscribed and sworn to before me this 30th day of June,
A. D. 1895.

[SEAL.]

ELMER H. ADAMS,
Notary Public."

The appellees pleaded that the claim of lien filed with the clerk of the Circuit Court was not truly set forth in the bill, and set out in the plea what purported to be a true copy of the claim so filed, alleging that the same was a true copy. The difference between the alleged copy of the claim of lien set out in the bill, in reference to which the question of law at issue here arises, is that immediately above the dates of the items of brick in the statement marked "Exhibit A," referred to in the bill, and which statement is a part of the claim, are the figures 1893, and in the copy of claim set out in the plea, the figures next above the same dates are 1892. In other words, by the statement of account set out in the bill as part of the claim of lien, the brick appears to have been furnished February 21st, 23d and 27th, and March 13, 1893, while by the statement of account set up in the plea the brick appears to have been furnished on the same days of the same months, in the year 1892.

Upon the filing of appellant's plea, appellees, by leave of court, amended their bill, averring, in substance, that the figures 1892 were inserted by mistake of the

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scrivener, instead of 1893, that the brick was, in fact, furnished in 1893, which appellees well knew, and that no damage had accrued to appellees by said mistake.

Appellees demurred to the bill as amended, and the court sustained the demurrer and dismissed the bill.

Section 4 of the act of 1874, in relation to liens as amended by the act of 1887, in force when the alleged contract was made, provides: "Every creditor or contractor who wishes to avail himself of the provisions of this act shall file with the clerk of the Circuit Court of the county in which the building, erection, or other improvement to be charged with the lien is situated, a just and true statement of account or demand due him, after allowing all credits, *setting forth the time when such material was furnished* or labor performed, and containing a correct description of the property to be charged with the lien, and verified by an affidavit," etc. Hurd's Stat. 1893, p. 930; Sess. Laws 1887, p. 219.

The statute with regard to liens is in derogation of the common law, and the Supreme Court has frequently decided that it must be strictly construed. Cook et al. v. Heald et al., 21 Ill. 425; Brady v. Anderson et al., 24 Ib. 110; Stephens v. Holmes, 64 Ib. 336; Canisius v. Merrill, 65 Ib. 67; Belanger v. Hersey, 90 Ib. 70; Butler et al. v. Gam, 128 Ib. 23; McDonald v. Rosengarten, 134 Ib. 126; Williams v. Vanderbilt, 145 Ib. 238; Griffin v. Booth, 152 Ib. 219; McIntosh v. Schroeder, 154 Ib. 521.

In Cook et al. v. Heald, *supra*, the court uses the following language, which is quoted with approval in subsequent cases: "The lien is given by statute, and is in derogation of the common law, and is opposed to common right and should be strictly construed. The remedy is cumulative to the ordinary remedy given by the common law, and as it is a privilege enjoyed by one class of the community above that of all others, to be available, the party seeking to enforce it should bring himself within the terms of the statute."

In Brady v. Anderson et al., *supra*, the court say: "This lien, like all others of the same character, should be fairly

enforced when the party brings himself within the provisions of the statute, but it should not be extended to cases falling within the reason, but not provided for by the language of the statute."

The provision in section 4, *supra*, that the statement required by the section shall set forth "the time when such material was furnished or labor performed," is material and imperative. *Campbell v. Jacobson*, 145 Ill. 389.

In the last case the court held that an omission to state in the claim of lien the times when the material was furnished and labor performed was fatal to the claim, saying, among other things: "A mechanic's lien does not exist and is not enforceable of common right, but is purely a statutory lien, and can be maintained only upon those conditions which the statute imposes." In the present case the statement filed July 5, 1893, verified by the affidavit of B. W. May, alleges that the statement of account "is a just and true statement of the account due May, Purington & Bonner Brick Company," etc. This statement shows that the last of the brick was furnished March 13, 1892. It is stated in the bill, that the price of the brick became due and payable the 10th day of the month succeeding the last delivery of brick, which would be April 10, 1892, in accordance with the statement of claim filed with the Circuit Court clerk, July 5, 1893, more than fifteen months after April 10, 1892. It stands confessed, by the amendment of appellant's bill, that the statement in its claim of lien of the times at which the brick was furnished is untrue in fact; and if an omission to state any time is fatal to a claim of lien we can not perceive how it can be held that a false statement of the time, a statement variant from the true time by twelve months, can be held to be a compliance with the statute. The statute requires a true statement, verified by affidavit, of the time when the material was furnished, and if the omission to make such statement is fatal, how can it be held that a false statement of the time is not fatal? Certainly a false statement is not within the terms of the statute; is "not provided for by the language of the

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statute," to use the language of the Supreme Court in *Brady v. Anderson, supra*.

We are aware that this construction is strict, and that it may appear a great hardship to appellant to so construe the statute, but in view of the decisions of the Supreme Court, which we regard as in entire harmony with the law applicable to statutory liens, we can not escape the conclusion that the error in appellant's claim of lien is fatal to the claim. Jones says of statutory liens: "The courts can not extend the statute to meet cases for which the statute itself does not provide, though these may be of equal merit with those provided for." 1 Jones on Liens, Sec. 105.

"A statutory lien can exist only when it has been perfected in the manner prescribed by the statute authorizing it." *Ib.*, Sec. 107.

Appellant's counsel contend that the amendment of the bill alleging that the date 1892 was inserted by mistake, and that appellees well knew the times when the brick was furnished, cures the error. In this view we can not concur. Nothing could cure the error in the claim filed July 5, 1893, except an amended or supplemental claim filed with the clerk of the Circuit Court within the time prescribed by the statute. *McDonald et al. v. Rosengarten et al.*, 134 Ill. 126, 132.

Section 4 provides: "Any person having filed a claim for a lien as provided in this section, may bring a suit at once to enforce the same by bill or petition in any court of competent jurisdiction in the county where the claim for a lien has been filed."

The filing a statement, as prescribed by section 4, being made a condition precedent to the bringing suit, it seems too clear for argument that the claim of lien can not be amended after suit brought, so as to affect the suit, and that no amendment of the bill could possibly cure any error in the claim of lien.

The averment in the amended bill, that appellees knew the times when the brick was furnished and could suffer no

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damage by the error in the claim of lien, can not, even though true, avail appellant. The lien claimed must exist, if at all, by reason of appellant's compliance with the provisions of the statute, and neither the knowledge nor the ignorance of appellees of the facts can affect the vital inquiry, has appellant so complied with the statute as to entitle it to a lien. Von Tobel v. Ostrander, 158 Ill. 499, 503.

We are of opinion that the demurrer to appellant's amended bill was properly sustained.

The decree will be affirmed.

Huntley Manufacturing Co. and The Arlington & Curtis Manufacturing Co. v. Michigan Central Railroad Co. et al.

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1. **MECHANICS' LIENS**—*Application of the Law to Railroad Corporations.*—The general mechanic's lien act applies to property owned by railroad corporations when such property is in no way essential to the operation and maintenance of the road, and if the severing it from the road will not prevent the continuance of the business of the road as a carrier.

2. **RAILROADS**—*Applicability of the Mechanic's Lien Law.*—As a general rule the ordinary mechanic's lien laws do not embrace railroads.

3. **SAME**—*Railroad Property, When Subject to Mechanics' Liens.*—The mere fact that a building upon which it is sought to enforce a lien is of use to a railroad corporation in its business will not operate to bring it within the protection of the general rule if, from its nature, the property can be sold to satisfy the lien without interrupting the continual operation of the road.

Proceedings under the Mechanic's Lien Act.—Trial in the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Judgment on demurrer for defendant and bill dismissed for want of equity. Appeal by complainant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed May 9, 1898.

STATEMENT.

This is a suit to enforce a mechanic's lien. The Simpson & Robinson Company, as general contractor, erected and

equipped a building for appellee. The building was to be used as a grain elevator, and was built upon a tract of land adjoining the tracks of appellee and being the property of appellee.

Fairbanks, Morse & Co. filed an original petition to enforce a lien as a sub-contractor. Appellant, with leave of court, filed its intervening petition to enforce its alleged lien as a sub-contractor. By the intervening petition, as finally amended, appellant alleged that it was engaged in the business of manufacturing certain kinds of machinery used in grain elevators, and that the Simpson & Robinson Company had applied to it to furnish certain materials and machinery for use in appellee's elevator, situated upon the land described in the bill of complaint; that it entered into a contract with said Simpson & Robinson Company to furnish same, and afterward delivered same at appellee's building; that the materials and machinery delivered were accepted by both the Simpson & Robinson Company and appellee, and that said materials and machinery were actually used in the equipment of said elevator and are a valuable and permanent improvement to said elevator building; that payment of the contract price was demanded of the Simpson & Robinson Company by appellant, and that it had failed to pay said claim; that notice of lien was duly served on appellee; that appellant was a sub-contractor on said elevator building. The petition also sets up that the contract entered into between the Simpson & Robinson Company and appellee was to be performed within three years from the date thereof; that the contract entered into between appellant and the Simpson & Robinson Company was oral; that the same was completed in less than a year; that appellant caused the notice to be served on appellee, the owner of the premises on which the lien is claimed, on June 5, 1896, which was less than sixty days from the date stated, on which the work was completed and delivered to the Simpson & Robinson Company and to appellee, viz., April 25, 1896.

The petition further sets up that on or about April 30,

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1896, there was \$10,000 due and owing to the Simpson & Robinson Company from appellee; that neither the Simpson & Robinson Company nor appellee performed the duty imposed upon each by section 5 of the act to revise the law in relation to mechanics' liens, viz., to furnish to the owner a statement under oath by the contractor, giving number, names, etc., of sub-contractors, etc.; that appellant did not waive its right to a lien, nor agree to look solely to the contractor, the Simpson & Robinson Company; that section 33 of said act relating to mechanics' liens applied, and payments, if any were made by appellee to the contractor, were not rightfully made as against this petitioner. A copy of the notice for lien which was served on appellee is attached to the petition. The record shows that the petition was filed within the time limited by the statute.

To the intervening petition, as amended, appellee demurred, the demurrer was sustained by the trial court, and the petition was dismissed for want of equity. From this decree appellant prosecutes the appeal here.

WILBER, ELDRIDGE & ALDEN, attorneys for Huntley Mfg. Co., and SMOOT & EYER, attorneys for A. & C. Mfg. Co., appellants.

WINSTON & MEAGHER, attorneys for appellee; FREDERICK R. BABCOCK, of counsel.

There can be no mechanic's lien on public property, unless the statute creating such lien expressly so provides. Such a lien would be contrary to public policy and would also be incapable of enforcement, public property not being subject to forced sale. 2 Jones on Liens, Par. 1375; Phillips on Mechanics' Liens, Par. 179; Hovey v. Town of East Province, 17 R. I. 80, 20 Atl. Rep. 205; Mayrhofer v. Board of Education, 89 Cal. 110, 26 Pac. Rep. 646; Fatout v. Commissioners, 102 Ind. 223, 1 N. E. Rep. 389; Portland Lumber & Manfg. Co. v. School Dist. No. 1, 13 Ore. 283, 10 Pac. Rep. 350; Jordan v. Board of Education, 39 Minn. 299, 39 N. W. Rep. 801.

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MR. JUSTICE SEARS, after making the foregoing statement, delivered the opinion of the court.

Counsel for appellee contend that the demurrer to the intervening petition of appellant was properly sustained, because, they say:

1st. The general mechanic's lien act does not apply to permit liens upon the property of railroad companies.

2d. If the general mechanic's lien act could apply, its provisions have not been so complied with as to entitle appellant to a lien.

It is true that, as a general rule, the ordinary mechanic's lien laws do not embrace railroads. In Wood on Railroads, Vol. 2, Sec. 288, the author says: "Because of the character of railroads as *quasi* public highways, and the inconveniences and annoyances to which the public are apt to be subjected by the enforcement of liens against a railroad or its appurtenances, the ordinary mechanic's lien laws are construed as not embracing railroads unless it is expressly provided otherwise." To the same effect are 2 Jones on Liens, 1618; 3 Elliott on Railroads, 1066; Boisot on Mechanics' Liens, 188; Buncombe County Com. v. Tommey, 115 U. S. 122; Graham v. Mt. Sterling C. R. Co., 14 Bush. (Ky.) 425.

It is, however, apparent from these decisions and from the language of the text writers, that the rule announced rests upon grounds of public policy and the inexpediency of permitting parts of the property of a railroad which are essential to its operation and maintenance, to be subjected to the enforcement of liens, and possibly severed from the railroad property as an entirety.

In Buncombe County Com. v. Tommey, *supra*, the court said :

"Apart, however, from these considerations, we are of opinion that a law giving to mechanics and laborers a lien on buildings, including the lot or ground upon which they stand, or a lien upon a lot or farm or other property, for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted

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as giving a lien upon the roadway, bridges, or other property of a railroad company, not essential in the operation and maintenance of its road."

There is no reason why the rule should apply to protect property owned by a railroad, if such property be in no way essential to the operation and maintenance of the road, and if the severing of it from the road could not prevent the continuance of the business of the road as a carrier. Nor would the mere fact that the building upon which the lien was to be enforced was of use to the railroad in its business as a carrier, operate to bring such building within the protection of the rule, if it could, nevertheless, be sold to satisfy the lien without interrupting the continued operation of the road. The enforcing of a lien by coercive sale of a part of the road-bed might well be held to be against the reason of the rule, while the sale of a depot building or storehouse would not be. *Hill v. LaCrosse & Mil. R. R. Co.*, 11 Wis. 223; *Botsford v. N. H., M. & W. R. R. Co.*, 41 Conn. 454; *McIlvane v. H. & M. R. R. Co.*, 5 Phila. 13.

It was held in *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, that a lien under a general mechanic's lien law may be enforced even as against bridges of a railroad; but this would seem to be against the weight of authorities.

In *King v. Alford*, 9 Ontario, 643, the court noted the distinction between property which was, and such as was not, essential to the operation of the road. The court said:

"It is a material ingredient of this case that it is found as a fact that the lands on which are the buildings in question, consisting of a turn-table and engine-shed, are essential for the proper working of the railway."

The text writers generally agree that railroad depots, stables and like structures are not within the application of the rule exempting railroad property from mechanics' liens. *Boisot on Mechanics' Liens*, Sec. 179; 3 *Elliott on Railroads*, Sec. 1069; 2 *Wood on Railroads*, Sec. 288.

We are referred to no case, and find none, holding that such a building as the one here is within the reason and application of the rule, except *Schulenberg v. R. R. Co.*, 67

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Mo. 442, and we think that this decision is against the weight of authorities. Nor can it be maintained that our statute providing for liens upon railroads applies to the lien here to the exclusion of the general lien act. The statute is as follows:

“All persons who may have furnished, or shall hereafter furnish, to any railroad corporation now existing or hereafter organized under the laws of this State, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such road, by contract with such corporation, or shall have done or performed, or shall hereafter do or perform any work or labor in such construction, maintenance, operation, or repair by a like contract, shall be entitled to be paid for the same as a part of the current expenses of such road; and in order to secure the same shall have a lien upon all the property, real and personal and mixed, of such railroad corporation, as against said railroad, and as against all mechanics’ or other liens which shall accrue after the commencement of the delivery of such articles, or the commencement of such work or labor.”

It could hardly be maintained that the lien of appellant was for anything furnished which was “necessary for the construction, maintenance, operation or repair of the road” of appellee. And the provisions of this statute recognize the possible application of a mechanic’s lien other than the lien therein provided. This statute does not necessarily exclude any application of the general mechanic’s lien act to railroads. *Botsford v. New Haven, M. & W. R. R. Co., supra.*

The second contention of counsel is that appellant does not show by its petition any right to a lien under the general mechanic’s lien act. In this behalf it is argued that petition fails to show that any amount was due to the original contractor, the Simpson & Robinson Company, on June 5, 1896, the date of the notice by appellant of its lien. The petition does state that on or about April 30, 1896, there was \$10,000 due and owing to the Simpson & Robinson

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Company from appellee, and the petition further states in effect, that no statement under oath was made by the original contractor and furnished to the appellee, as required by section 5 of the mechanic's lien act. Section 33 of the same act provides, that "no payment to the contractor or to his order shall be regarded as rightfully made as against the sub-contractor, or parties furnishing materials, if made by the owner without exercising or enforcing the rights and powers conferred upon him in sections 5 and 23 of this act."

We are of opinion, therefore, that the allegations of the petition are in effect that there was, as between appellant and appellee, due and owing by appellee to the original contractor on June 5, 1896, the sum of \$10,000.

It is also urged that the concluding clause of section 5 excepts material men from its operation, and hence excepts appellant. The clause in question is, "But this section shall not apply to * * * nor to merchants and dealers in materials only."

If it could be maintained, as it can not, that Simpson & Robinson Company, the original contractor, was a "merchant or dealer in materials only," there might be some force in the contention. The clause could apply to the original contractor only and not to appellant.

Finally, counsel for appellee contend that the notice served by appellant upon appellee is defective and insufficient, in that it fails to state definitely when the amount due appellant became due.

The lien notice served on appellee upon June 5, 1896, by appellant, contained this statement: "And that there was due to the undersigned on the 21st day of May, 1896, therefore, the sum of one thousand one hundred ninety-six and 10-100 dollars." We are of opinion that this is sufficient in the particular in question.

The demurrer should have been overruled.

The decree is reversed and the cause remanded.

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Chicago and Grand Trunk Ry. Co. v. Frank T. Kinnare, Adm'r.

1. **WAIVER—Of the Right to Have a Case Taken from the Jury.**—By failing to ask a written instruction directing the jury to find for the defendant, at the close of the evidence, before the argument and submission of the case to the jury upon its merits, and by arguing the case and asking other instructions upon the questions of fact to be submitted, a party waives his right to have the case taken from the jury.

2. **ORDINARY CARE—Persons in Imminent Peril.**—When the position of a person at the time of an injury is such that it appeared to him that he was in imminent peril, and that he must act without time for reason and reflection, the question as to whether he acted as a reasonably prudent and cautious person would have done, under the circumstances, is one for the consideration of the jury.

3. **EVIDENCE—Condition of the Railroad Track at the Place of an Accident.**—In actions for personal injuries where the condition of the rails at the place of the accident is in question, it is not necessary to confine the evidence to the condition of the rails at the exact place where the injury was received.

4. **SAME—Warning of the Approach of Trains—Res Gestæ.**—In actions for personal injuries, resulting from accidents on railroads, evidence of the speed of the train and as to whether a bell was rung and whistle blown, or any warning of the approach of the train given, is admissible as a part of the *res gestæ*.

5. **CONTRIBUTORY NEGLIGENCE—Persons in Peril.**—Whether a person injured in a railroad accident was or was not, as a matter of fact, in a place of peril, if, under the circumstances which suddenly confronted him, it seemed to him that he was in imminent peril, he can not be considered as necessarily guilty of contributory negligence.

6. **APPELLATE COURT PRACTICE—What Can Not Be Assigned as Error—Waiver.**—Where the written motion for a new trial does not assign as a reason that the damages are excessive, it is too late to assign the same for error in the Appellate Court. Not having presented the point to the trial court, it is waived.

Trespass on the Case.—Death from negligent act, etc. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Verdict and judgment for plaintiff, \$4,600. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898. Rehearing denied June 2, 1898.

S. A. LYNDE, attorney for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

George M. Kenney, a switchman employed by appellant, aged not quite nineteen years, and after he had been working only four days, was so injured November 7, 1892, by being run over by appellant's engine drawing a train of passenger cars in its switching yards in Chicago, that he died the following day. His administrator, the appellee, brought suit against appellant, and recovered a verdict and judgment for \$4,600 in the Circuit Court of Cook County, from which an appeal has been taken.

Appellant contends, first, that a verdict should have been directed for it by the trial court; second, that deceased was guilty of contributory negligence, and that the verdict was contrary to the evidence; third, that the court erred in its ruling on the admission of evidence offered by appellee and on motion to strike out certain evidence; fourth, that the court improperly refused appellant's 11th instruction and modified appellant's instructions numbered 9 and 12½; and, fifth, that the verdict was excessive.

1st. At the close of appellee's evidence appellant moved the court to exclude the evidence and direct a verdict for defendant, which the court overruled. The same motion was renewed at the close of all the evidence, and overruled. No written instruction appears in the abstract as having been requested of the court when either of said motions was made, and after the latter motion was overruled. Defendant, as shown by the record, after the arguments to the jury had been completed, moved the court to give, with other instructions on the questions submitted to the jury, an instruction directing the jury to find a verdict for the defendant, which instruction the court refused to give. Under similar circumstances, in the case of *Railway Company v. Fishman*, 169 Ill. 197, the Supreme Court said: "The court properly refused it, for the reason it called upon the court to decide, as matter of law, the evidence did not warrant the submission of the case to the jury. The appellant had

already submitted the case, and thereby conceded the character of the evidence warranted that course, and having done so, could not be allowed to retract its steps and demand the court should exclude the evidence and peremptorily direct a finding in its favor."

By failing to present and asking the court to give a written instruction directing the jury to find a verdict for defendant, at the close of all the evidence, before the argument and submission of the case to the jury upon the merits, and by arguing the case to the jury and asking other instructions upon the questions of fact submitted to the jury, along with the peremptory instruction, appellant waived its right to have the case taken from the jury, and there was no error in its refusal. *City of Chicago v. Fitzgerald*, 75 Ill. App. 174, and cases cited; *Vallette v. Bilinski*, 167 Ill. 564; *Wright v. Avery*, 172 Ill. 313.

We have, however, given careful consideration to the evidence in the light of the able and exhaustive arguments of counsel, as to its sufficiency to warrant a verdict for appellee because of the claim that appellee's intestate knowingly assumed the hazard to which he was exposed and which caused his death, and the further claim that the condition of appellant's track and the fact that the trucks of the car left the rail, was not the proximate cause of the accident, and have reached the conclusion that the evidence on these points presents questions peculiarly for the consideration of a jury, and we can not say that it fails to justify the verdict. *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 185.

2d. The evidence bearing on the question as to whether deceased was guilty of contributory negligence, was of such a nature, impartial and fair-minded men might, in considering it, have arrived at different conclusions. It tended to show that deceased was suddenly and without any previous warning placed in a position of extreme peril to life and limb, by the switch engine, on the foot-board of which he was standing at the time in the performance of his duty as a switchman, running off the track. At least his position at

that time, as the evidence tends to show, was such that it may have appeared to him that he was in imminent peril, and that he must act without time for reasoning and reflection.

And while it may now, in the light of occurrences as they later transpired, well be claimed that had he remained on the foot-board of the engine, instead of jumping off and in front of the passenger engine going in an opposite direction, as it appears from the evidence he did, no harm would have befallen him, still, what a reasonably prudent and cautious person would have done under the circumstances of sudden or supposed sudden peril in which deceased was placed, was a question for the consideration of the jury, and we can not, after the most careful consideration of the evidence and the argument of appellant's counsel, reach the conclusion that the jury's finding in this regard is clearly against the weight of the evidence, or against the instructions of the court.

3d. The court, over the objection of appellant, allowed certain evidence to go to the jury with reference to changing rails in appellant's switch tracks at a point a little distant from the place of the accident, and also as to the condition of a stub switch and the rails at the stub switch located at a little distance—two or three car lengths—from where the accident occurred.

The declaration charged that appellant was negligent in that it required deceased to switch cars in its yard on tracks which were not in a reasonably safe, sound or suitable condition to be switched upon; that some of the rails constituting said track on which the injury occurred, were so old, defective and badly worn, and so improperly and insecurely placed, that cars being switched thereon were likely to jump and leave the same, etc.

We think, under these allegations, the court did not err in the respects claimed. It was not necessary to confine the evidence to the condition of the rails at the exact place of the accident. In any event we can not see how the evidence was prejudicial to appellant, for the other evidence was quite clear that at the very place of the accident the track was in

bad condition. When the objection was made as to the evidence relating to the condition of the switch and its rails, counsel for appellee stated that he understood appellant would claim the accident occurred at the switch, and if counsel would then state that he would not make such a claim, it might be stricken out; but counsel for appellant making no response, the court, and we think properly, overruled his objection, and motion to strike out. Complaint is also made that the court erred in permitting testimony as to the speed of the passenger engine, and as to whether a bell was rung or whistle blown or any warning given of its approach. We think this evidence was admissible as part of the *res gestæ*. This engine was going in an opposite direction on a track to the north from the engine, on the south end of the foot-board of which deceased was standing when it ran off the track. The speed of the passenger engine, and whether or not there was any warning of its approach, was not only competent but very important as bearing upon the question of deceased's care. We are of opinion that because this evidence was important the court did not err in allowing appellee, in rebuttal, to show that appellant's engineer and fireman, who ran the passenger engine, had been present in the court room during the trial, that they were still in appellant's employ and were not in court at that time (not having been called to testify by appellant). Of all persons, most certainly the engineer and fireman knew the speed of their engine, and what warning, if any, was given of its approach, and appellee might well have claimed, if it was going rapidly, as the evidence tended to show, and no warning was given, that deceased had no knowledge that it was near, and therefore was not guilty of contributory negligence. 1 Jones on Evidence, Sec. 17; Consolidated Coal Co. v. Scheiber, 167 Ill. 546.

4th. The eleventh instruction asked by appellant and refused was, viz.:

" 11. If the jury believes from the evidence that the derailling of the car did not place the deceased in peril, and that he could easily have avoided all danger by stepping

from the foot-board of the engine to the south side of the engine, and that a reasonable and prudent man would, under the circumstances, have done so, then the jury must find the defendant not guilty."

We think this instruction was properly refused, because, so far as it may be said to be proper, the tenth and twelfth instructions given sufficiently instruct the jury. It omits however, an important element, that is, that while deceased might not, as matter of fact, have been in a place of peril, it may have seemed to him, under the circumstances which suddenly confronted him, that he was in imminent peril, and therefore not necessarily guilty of contributory negligence. Ry. Co. v. Becker, 76 Ill. 25-31; D. T. & W. Co. v. Dandelen, 143 Ill. 416.

The ninth instruction, as asked, was, viz.:

"9. Every person in entering upon the employment of another assumes all the usual risks of that employment. If such employe is set to work upon a defective track and continues in that employment after having had an opportunity to observe the condition of the track, then he assumes the risks of working upon such track, and for any accident occurring through the condition of said track he can not recover damages."

This instruction was modified by the insertion of the words "and know" after the word "observe," in which we think there was no reversible error. It is not enough to prevent the servant's recovery that he observes a condition existing, but he must know, or by the exercise of ordinary care should know, the attendant danger of such condition. Consolidated Coal Co. v. Haenni, 146 Ill. 614-25; Illinois Steel Co. v. Schymanowski, 162 Ill. 447-59.

The instruction numbered twelve and a half, as asked, was, viz.:

"12½. If the jury believes from the evidence that the deceased passed over the foot-board from the south to the north side of the track, and was negligent in so doing, and that such act of deceased contributed materially to the accident, then you must find the defendant not guilty."

The court modified it so that it read as given, viz.:

"12½. If the jury believes from the evidence that the deceased passed over the foot-board from the south to the north side of the track, and taking into consideration the circumstances surrounding him, as shown by the evidence, as they appeared to him at the time, was negligent in so doing, and that such act of deceased contributed materially to the accident, then you must find the defendant not guilty."

We think the modification was a proper one.

5th. The written motion for new trial did not assign as a reason for granting a new trial that the damages were excessive. It is now, for the first time in this court, too late to assign it for error. Not having presented this point to the trial court, it is waived. *Morier v. Moran*, 58 Ill. App. 240; *Jones v. Jones*, 71 Ill. 562; *R. R. Co. v. McMath*, 91 Ill. 104-12.

The judgment is affirmed.

William D. Gibson Co. v. Jacob Glizozinski.

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1. **LEADING QUESTIONS—*Discretion in Allowing.***—Trial courts have a large discretion in the matter of leading questions, and unless there has been a manifest abuse of such discretion, to the substantial injury of the party complaining, the judgment will not be reversed.

2. **QUESTIONS OF FACT—*Assuming the Risk of Employment.***—Whether the risk of an employment in a certain case is one assumed by the servant, is a question for the jury.

3. **DAMAGES—\$7,500 *Not Excessive.***—A laboring man, forty-seven years of age, whose arm was caught between a belt and revolving shaft, was carried around the shaft and his arm injured, so as to render amputation near the shoulder necessary. He had been receiving from \$1.25 to \$1.50 per day as wages. A judgment for \$7,500 was held not excessive.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE G. HANEY, Judge, presiding. Verdict for plaintiff, \$10,000. Remittitur for \$3,500. Judgment for \$7,500. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

Gibson v. Glizozinski.

JOHN A. POST and CHARLES B. STAFFORD, attorneys for appellant.

KAVANAGH & O'DONNELL, attorneys for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This was an action on the case for a personal injury alleged to have been occasioned to appellee by appellant's negligence.

The following statement of appellee's claim, contained in the printed argument of appellant's counsel, is substantially correct.

"The claim of the plaintiff, as set forth in his declaration, and in the several amendments and additional count, is, in substance, that he was in the employ of the defendant; that the defendant was operating a plant for the manufacture of springs and furniture; that in this plant was a machine for the cutting of springs, which was operated by a belt driven by means of shafting; that the belt was uneven in width and rough as to its surface, and that therefore it was apt to slip off the shafting, and also apt to catch the clothing of those working about it; that the plaintiff was employed as a common laborer; that upon the occasion of the accident the belt had slipped off the pulley to the shaft; that defendant's foreman ordered the plaintiff to replace the belt upon the pulley while the shafting continued in motion; that the foreman did not call the plaintiff's attention to the danger, and that while in the exercise of due care, plaintiff, in attempting to readjust the belt, was caught between the belt and the revolving pulley, and part of his arm torn off, necessitating the amputation of the arm at the shoulder."

The elements of negligence specially charged against the defendant are:

"First. That the belting furnished was not in a reasonably safe and proper condition.

Second. The failure of the foreman or superintendent under whose direction the plaintiff worked, to warn the

plaintiff as to the danger of adjusting belts on a rapidly revolving shaft.

Third. The failure to furnish a sufficient number of men to properly and safely adjust said belting.

Fourth. That the defendant failed to stop the revolving shaft so that plaintiff might perform the work in safety.

Fifth. That there was no tight and loose pulley, nor any appliance by which the belts might be changed from the pulley upon the shaft without danger."

The jury found a verdict for appellee, and assessed his damages at the sum of \$10,000. On motion for a new trial by appellant, appellee, by his attorney, remitted \$2,500 and judgment was entered for \$7,500.

The grounds for reversal of the judgment urged by appellant's counsel are as follows :

"First. The court below erred in certain rulings as to testimony.

Second. The damages are excessive.

Third. If the testimony of the plaintiff be taken as true, there is a clear case of assumption of risk.

Fourth. That the account given by the plaintiff and his witnesses, of the accident, is not true; but as shown by the testimony of the defendant, the plaintiff was hurt in meddling voluntarily in work outside of the scope of his employment."

Jacob Glizozinski, the plaintiff, being called as a witness in rebuttal, was asked by his attorney the following question: "State whether or not it is a fact that Pisarski got up on the table under the pulley near the belt, and then got down again and went over to you and spoke to you?" Appellant's counsel objected to the question, and the objection was overruled.

John Smith, a witness for appellant, had testified that he noticed Pisarski, a son-in-law of appellee, who was in appellant's employ, standing on a bench to put the belt on the pulley; that Pisarski got down off the bench and went over to where appellee was working and had some conversation with appellee, and that then appellee got on the bench to

place the belt. It was appellant's theory that Pisarski, and not appellant's foreman, requested appellee to put the belt on the pulley, and the foregoing evidence of Smith was introduced as tending to support that theory. It was clearly competent for appellee in rebuttal to prove that Pisarski was not on the table attempting to put the belt on the pulley, and that he did not converse with appellee before the latter attempted to put it on. The question was relevant and material, and was not objected to as leading.

Pisarski being called in rebuttal, the following question was asked him:

"Q. Mr. Pisarski, just before your father-in-law got hurt, did you, yourself, get up on the table and then get off and go over and speak to your father-in-law?"

This question was objected to as leading. The witness Smith having testified that Pisarski did as stated in the question, we are of opinion that it was competent to ask Pisarski directly whether he so did. The only alternative to this would have been to re-examine the witness Pisarski as to the facts, which he had already fully testified to, having been called as a witness in chief for appellee. But even conceding that the question is objectionable as being leading, this is not necessarily reversible error. A trial court has large discretion in the matter of leading questions, and unless there has been a manifest abuse of such discretion to the substantial injury of the party complaining, the judgment will not be reversed. *Funk v. Babbitt*, 156 Ill. 408.

We do not think there has been such abuse or injury in the present case.

Whether the risk was one assumed by the appellee was a question for the jury. Appellant asked no instruction bearing on that question, nor any instruction, except that the jury should find the defendant not guilty. Whether "the account given by the plaintiff and his witnesses of the accident" was or not true, was a question for the jury. The evidence was conflicting, and not being of the opinion that the verdict is contrary to the weight of the evidence, we can not disturb it.

The evidence of appellee's injury is that while he was standing on a bench, and after he had put the belt in place on the pulley, while the shaft was revolving, it suddenly jumped from the pulley, and his arm was caught between the belt and shaft, and he was carried round with the shaft. About half of his left arm was torn off, and the flesh was stripped off the remainder nearly to the shoulder, in consequence of which the arm had to be and was amputated near the shoulder. At the time of the accident, October 9, 1894, appellee was between forty-six and forty-seven years old, was a laboring man, and had been receiving from \$1.25 to \$1.50 per day as wages. We can not say that the judgment is manifestly excessive.

The judgment will be affirmed.

Andrew Belinski v. Rudolf Brand, John A. Orb and Theodore Oehne.

1. PRACTICE—*Motion to Strike from Short Cause Calendar.*—A motion to strike a cause from the short cause calendar, where the grounds of the motion relate to irregularity of service of notice and filing affidavits, comes too late when the cause is reached for trial.

2. WAIVER—*Of Notice and Demand for Possession.*—Where the terms of the lease expressly waive notice and demand, such notice and demand are not essential to a recovery of possession of the demised premises.

3. LEASE—*When its Provisions Will Control—Tenant Holding Over.*—Where a tenant holds over and the assignee of the lessor recognizes him as holding over, the provisions of the lease must be treated as controlling.

4. LESSOR—*Rights Vest in Grantee.*—Where a lessor conveys the demised premises, whatever rights under the lease were in him will be vested in his grantee by reason of the conveyance of the premises and by force of the statute.

5. FORMER DECISION—*Explained.*—Sexton v. Chicago Storage Co., 129 Ill. 818, explained, as not holding contrary to the decision here announced.

6. VERDICTS—*Description of Premises in.*—Where a verdict in an action of forcible detainer follows the description in the complaint, it

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| 76 | 404 |
| 86 | 646 |

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| 76 | 404 |
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| 76 | 404 |
| 102 | 1372 |
| 102 | 1487 |
| 198s | 2285 |

| | |
|-----|-----|
| 76 | 404 |
| 104 | 128 |

| | |
|-----|------|
| 76 | 404 |
| 111 | 2366 |

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does not matter what the description may have been in the instruction given to the jury directing a verdict.

7. **RECEIPTS—*For Rent—In Whose Name Given, Not Material.***—The fact that the receipts for rent were given in the name of the appellees only, is not material.

8. **INSTRUCTIONS—*To Find for Plaintiff, When Proper.***—When the plaintiff is entitled to a verdict upon the evidence and there is no evidence to warrant a verdict for the defendant, an instruction to find for the plaintiff is proper.

Forcible Detainer, for possession of demised premises. Trial in the Circuit Court of Cook County on appeal from Justice's Court; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff; defendant appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

STATEMENT.

This is an action of forcible detainer brought by appellees to recover possession of premises held by appellant.

Appellant entered into possession of the premises August 1, 1894, under a lease made by the National Brewing Company, then owner, which lease demised until April 30, 1895, and contained a provision for an extension of one year beyond that time, at the election of appellant, the lessee. The lease contained a provision that if default be made in payment of rent, it should then be lawful for the lessor, or its legal representatives, "without notice to declare said term ended, and to re-enter said demised premises, or any part thereof, either with or without process of law." And in the clause providing for suit by lessor to recover possession, and for confession of judgment therein by lessee, it is provided that the lessee is "hereby expressly waiving all right to any notice or demand under any statute of this State relating to forcible entry and detainer."

Appellant elected to extend the lease after April 30, 1895, by remaining in possession as lessee. On March 31, 1896, the National Brewing Co., the lessor, conveyed the premises and assigned the lease to appellees. Appellant paid rent to the agent of appellees from that date until December, 1896, at the rate provided by the lease, and was informed that the collection was made by such agent for

appellees. It is not disputed that the December, 1896, and January, 1897, rent was unpaid. For this non-payment of rent appellee elected to treat the term of the lease, *i. e.*, its extension by holding over, as ended, and on February 13, 1897, they brought this suit before a justice of the peace to recover possession. The trial in the Circuit Court was upon appeal from a judgment of the justice of the peace in favor of appellees.

The cause was placed upon the short cause calendar in the Circuit Court upon April 28, 1897. It was reached for trial upon June 21, 1897. A motion was then made by appellant to strike the cause from the short cause calendar, which was denied. Upon the trial, the Circuit Court at the conclusion of the evidence instructed the jury to find for appellees, the plaintiffs there.

F. L. SALISBURY and H. P. SINDEN, attorneys for appellant.

WINSTON & MEAGHER, attorneys for appellees; RALPH MARTIN SHAW, of counsel.

Appellees contended that a motion to strike a case from the short cause calendar comes too late when it is made when the case is called for trial. *Stewart v. Carbray*, 59 Ill. App. 398; *Johnston v. Brown*, 51 Ill. App. 549; *Oliver v. Gerstle*, 58 Ill. App. 615; *Treftz v. Stahl*, 46 Ill. App. 462.

It is a well-established rule of law that where a tenant remains in the premises after the termination of the lease, it will be presumed that he remains there under the terms and conditions of the original lease. *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151, 159; *Webster v. Nichols*, 104 Ill. 160, 173.

MR. JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellant that the court erred in denying the motion to strike the cause from the short cause calendar. Without discussing the grounds of the motion, which related to irregularity of service of notice and filing affidavit, it is enough to say that the

Belinski v. Brand.

motion came too late when made after the cause was reached for trial.

The notice upon which the cause was placed upon the short cause calendar, was served upon appellant on April 27th, was filed upon April 28th, and no motion was presented to strike the cause from the calendar until June 21st following, when the cause was called for trial. The court properly refused to entertain the motion at that time. *Treftz v. Stahl*, 46 Ill. App. 462; *Johnston v. Brown*, 51 Id. 549; *Oliver v. Gerstle*, 58 Id. 615; *Stewart v. Carbray*, 59 Id. 397; *Wheatley v. Chi. Trust & Sav. Bank*, 64 Id. 612.

It is also contended that notice to appellant and demand were essential before there could be a right of recovery of possession because of non-payment of rent. But the terms of the lease expressly waive notice and demand, and hence none were necessary. *Espen v. Hinchliffe*, 131 Ill. 468.

Appellant having held over, and appellees having recognized him as a tenant holding under the lease, its provisions must be treated as controlling. *Goldsbrough v. Gable*, 152 Ill. 594; *Condon v. Brockway*, 157 Id. 90.

Whatever rights under the lease were in the original lessor, were vested in its grantees, the appellees, by reason of the conveyance of the premises and by force of the statute. Rev. Stat., Chap. 80, Sec. 14; *Thomasson v. Wilson*, 146 Ill. 384.

Nor is the decision in *Sexton v. Chicago Storage Co.*, 129 Ill. 318, relied upon by appellant, to be regarded as holding to the contrary.

The announcement of the rule of the common law, that the right to enter for breach of condition subsequent could not be alienated, can not be taken as a construction of section 14 of our statute in relation to landlord and tenant. The effect of the decision, so far as it touches upon the question here considered, is to distinguish the right of re-entry, transferred to the grantee by force of the statute, from a reversionary interest, and it does not at all hold that such right of re-entry is not transferred by operation of the statute.

It is also urged that the description of the premises in the verdict is incorrect. The verdict follows the description in the complaint, as it should; and it does not matter what the description may have been in the instruction given to the jury directing a verdict. It is enough that the verdict is right.

The fact that the receipts for rent were given in the name of one of the appellees only, is not material. It is undisputed that the agent who collected acted for all the appellees.

There was no evidence which could have warranted the jury in finding the issues for appellant. Upon the evidence appellees were entitled to a verdict. Hence the peremptory instruction directing the jury to find for them was proper.

The judgment is affirmed.

Chicago & West Michigan Railway Co. v. Samuel Hull.

1. **BILLS OF LADING—*Prior Verbal Agreements.***—Notwithstanding a bill of lading is given by the carrier, it may be shown that there was a prior express oral agreement regarding the shipment. The rule that prior conversations are merged in the subsequent written contract does not apply.

2. **VARIANCE—*Must be Pointed Out in the Trial Court.***—In order that an advantage may be taken of a variance on appeal, it must appear that it was specially pointed out in the trial court, so as to enable the plaintiff to avoid it by an amendment.

Assumpsit, on a carrier's contract. Trial in the Circuit Court of Cook County, without a jury; the Hon. CHARLES G. NEELY, Judge, presiding. Finding and judgment for plaintiff of \$985. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 9, 1898.

ARND & ARND, attorneys for appellant; WILLIAM ALDEN SMITH and F. A. NIMS, of counsel.

MARCUS KAVANAGH and ALEXANDER S. BRADLEY, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee brought suit against appellant and other railway corporations which operate lines of railway, constituting the connecting roads from Benton Harbor, Mich., by way of Chicago, to Minneapolis, Minn., to recover the value of two car loads of apples that were delivered in October and November, 1889, by appellee to appellant for shipment, one car load from Watervliet and the other from Benton Harbor, both in Michigan, to be carried to Minneapolis, Minn. A trial before the court, without a jury, resulted in a finding and judgment against appellant for \$985, the plaintiff having amended by discontinuing as to the other defendants.

The principal contest on the facts was as to whether the contract of shipment was verbal or was contained in two bills of lading issued by appellant and delivered to appellee the day following the delivery of the apples in each instance. The only witnesses who testified regarding the verbal contract were appellee and William E. Wolfenden, who was agent of appellant at Benton Harbor at the time in question. Appellee testified, in substance, that Wolfenden told him that he would ship the apples direct from Benton Harbor, and also from Watervliet, through on appellant's line to Minneapolis at a certain rate, which he did not remember, but that it was so much per hundred; that Wolfenden said it was better for the apples to be put in a car in Benton Harbor and shipped direct to their destination than it was to ship them by boat, though I (meaning appellee) could get a lower rate; also that appellant's line extended to Minneapolis; that appellant would deliver the apples there at the Wisconsin Central depot without any transfer; that the freight was to be paid at Minneapolis, and that he, appellee, agreed to this and shipped one car from Watervliet in October, 1889, and one car from Benton Harbor in November, 1889; that he had been shipping apples over appellant's road for a number of years; that it was customary when he delivered apples to appellant to give it a shipping order, which, with the shipping receipt, formed one sheet, which was

torn in two in the middle, one being signed by the shipper and delivered to the railroad company, and the other signed by the railroad company and delivered to the shipper.

Wolfenden being asked if he made any verbal agreement with Hull about the shipment of apples mentioned in defendant's Exhibit 1 (the bill of lading of the car of apples shipped from Benton Harbor), "at the time these apples were received" by appellant, answered: "We made no verbal arrangement for the shipping of goods, other than the contract as shown there, except to solicit and quote rates as we might meet business men and parties interested outside of our freight office, making quotations and so on, and to specify rates and so on." He also testified that he had no control or authority over the agent of appellant at Watervliet, but nowhere denies that he had any of the conversation regarding the shipment of the apples as testified to by appellee.

The two bills of lading which were delivered to appellee the day following each shipment were issued by appellant, the one dated November 5, 1889, at Benton Harbor, showing the receipt from S. Hull, by appellant, of 160 barrels of apples, consignee Auction Commission Co., Minneapolis Minn., with "Car 2089" in pencil, and "W. C. R. R. Michewaka, Wis.," also in pencil, written across the face, and at the bottom of the sheet above the name of appellant, printed in large letters, followed by the signature of W. E. Wolfenden, agent, appears the following, printed in very small type, to wit:

"Contents otherwise unknown, for transportation and delivery with as reasonable dispatch as its business will permit, at the station to which addressed, if on the line of this company's road, and if such station be off the line of this road, then at the station where the next carrier on the through line can receive the same upon the following terms and conditions, viz.: That this company shall not be bound to carry by any particular trains; that the company shall not be liable for any loss or injury to said property occasioned by fire while at depots or stations, or during transit

C. & W. M. Ry. Co. v. Hull.

if said property be combustible, or by theft or by unusual or unavoidable accident; that all oils and other liquids, however carried, shall be at owner's risk of leakage; that all glass, earthen and queensware and contents, drugs and medicines, looking-glasses, marble, stoves and their furniture, stove plates and light castings, agricultural implements, cabinetware and furniture not boxed, carriages and other articles of like classes and descriptions, shall be at the owner's risk of breakage or damage by chafing; that oysters, poultry, dressed hogs, fresh meats and provisions of all kinds, trees, shrubbery, fruit, and all other perishable property shall be at owner's risk of frost or decay; also, that all other carriers transporting the property herein receipted for as a part of the through line, shall be entitled to the benefit of all the terms and conditions mentioned, and if a carrier by water, shall be entitled to the benefit of the further conditions that he shall not be liable for loss or damage arising from collision or any other damage incident to lake or river navigation. The company agrees to forward the property to the place of destination as per margin, but will not assume any liability on account thereof, after the same shall have left its line."

The evidence shows that the consignee of this car of apples was changed to S. Hull the day the bill of lading was delivered. The other bill of lading is the same, except that it is dated Watervliet, October 28, 1889; that the goods, 195 barrels of apples, were received from S. Handy; the consignee was S. Hull, Minneapolis, Minn., and there was written on its face under the consignee's name, "via W. C. R. R.," also "N. P. & M. 2089," and it is signed "W. E. Walden, agent." It is testified that "W. C. R. R." means Wisconsin Central Railroad, and that "N. P. & M. 2089" are the initials and number of the car.

The evidence also shows that appellee bought the apples which were shipped from Watervliet from S. Handy, who, as agent for appellee, delivered them to appellant, and he then received the bill of lading and turned it over to appellee the day following its date.

There is also evidence that in each instance when the apples were delivered to appellant, a shipping order was signed and delivered to appellant, but what the contents of the orders were does not appear, the orders not being produced nor any competent evidence of their contents.

The apples shipped from Benton Harbor were never delivered to appellee, but those shipped from Watervliet, 160 barrels, in a badly damaged condition, were offered to appellee, and when offered were worth fifty cents per barrel. The trial court found that there was an express verbal contract for each shipment of apples from Benton Harbor and Watervliet, Michigan, respectively, through to Minneapolis, and that the laws of Illinois control; also found the issues for plaintiff, and assessed his damages at \$985, on which judgment was rendered. No question is made as to the correctness of the court's finding of amount, if appellant is liable for any amount.

Appeal was taken, and it is claimed, in substance, 1st, that the trial court erred in holding that the laws of Illinois governed the rights and liabilities of the parties as to the contracts of shipment; 2d, that the laws of Michigan in this regard are different from the laws of Illinois, and should govern; 3d, that the court failed to apply the laws of Illinois; 4th, that the court erred in finding that there were express verbal contracts for the two shipments; 5th, in the admission and exclusion of evidence; 6th, in the denial of motion in arrest of judgment; and, 7th, in refusing to hold certain propositions of law asked by defendant.

1st. The contract of shipment of these apples, whether verbal or written, was made in the State of Michigan, and the law of that State must control in the determination of the rights and liabilities of the parties to it as to its nature, interpretation and effect. *R. R. Co. v. Boyd*, 91 Ill. 271; *Merchants D. T. Co. v. Furthman*, 149 Ill. 70.

2d. Having held that the laws of Michigan must control, it is only necessary to determine what are the laws of Michigan, and we need not inquire what are the laws of Illinois, or whether they differ from those of Michigan.

3d. Nor is it necessary for us to inquire as to whether the trial court failed to apply the laws of Illinois. We are to determine only whether in an effort to apply the laws of this State, it has or has not in effect applied the laws of Michigan. The Statutes of Michigan are, viz.:

“Section 3328. Any railroad company organized under this act, receiving freight for transportation, shall be entitled to the rights and be subject to the liabilities of common carriers, except as herein otherwise provided, but no such company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by an agreement to be signed by both parties thereto.”

“Section 3418. That no railroad company shall be permitted to change or limit its common law liability as a common carrier, by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried.”

They clearly provide that when a railroad company wishes to limit its common law liability as a common carrier of freight, it must have its contract in writing (none of it in print), and signed by the owner or shipper of the goods or property to be carried. As we have seen this was not done. Appellee's claim is that the contract of shipment was wholly verbal, and appellant's claim is that the contract is shown wholly by the bills of lading, which are printed, in so far as there is an attempt to limit the common law liability.

Then, if appellant's contention is correct, that the contract is contained in the bills of lading, under the laws of Michigan, these bills not being wholly in writing and not signed by appellee, there could be no limitation by them of appellant's common law liability, and the only inquiry then to be made would be, what was the common law liability of appellant under the bills of lading, but, as appears later, that inquiry is not necessary in this case.

4th. We think that the finding of the court, that there was an express verbal contract for each of the shipments

from Benton Harbor and Watervliet, respectively, to Minneapolis, is not manifestly against the weight of the evidence, and such it should be before we could interfere with it. The trial court, having seen and heard the witnesses testify, had a better opportunity of determining their credibility than we. Moreover, appellant's witness simply stated his conclusion when he said, "We made no verbal arrangement for the shipping of the goods other than the contract," referring to the bill of lading. The question also limited his answer to "the time when the apples were received," and to the shipment from Benton Harbor. The answer of the witness may be strictly and literally true, and it might still be equally true that he made the verbal agreement which appellee testified he did, before both shipments of apples were delivered to appellant. Appellee was not present when any of the apples were delivered to appellant, and he testifies that if the persons who delivered the apples signed any shipping order, as claimed, that they had no authority to make any agreement as to the shipments of the apples. It may also be true that Wolfenden had no control or authority over the agent of the company at Watervliet, as he says, and still he would have the full right to make a contract of shipment of the apples from Watervliet to Minneapolis, as was testified to by appellee and not denied by Wolfenden. These considerations, as it seems to us, notwithstanding the divers criticisms made by counsel on the testimony of appellee, were sufficient to justify the learned trial judge in finding that there was an express verbal contract for a carrying of both carloads of apples through from the respective points of shipment to Minneapolis, and this fact makes it unnecessary to determine what was appellant's common law liability under the bills of lading. Appellant further contends that the bills of lading, being made and delivered subsequent to the verbal agreement, superseded any previous conversations as testified by appellee, and that the testimony of appellee in that regard was incompetent. We think this contention can not be maintained. The verbal agreement was made before the

goods were delivered, and the bills of lading not made and delivered to appellee until some time afterward, when the apples had been shipped, and there is no evidence that appellee ever assented to any change in the original oral contract he made with Wolfenden. Under these circumstances the rule that prior conversations are merged in the subsequent written contract does not apply. *Merchants D. T. Co. v. Furthman*, 149 Ill. 70, and cases cited; *Bostwick v. Baltimore & O. Ry. Co.*, 45 N. Y. 712; *American Ex. Co. v. Spellman*, 90 Ill. 455; *Detroit & M. Ry. Co. v. Adams*, 15 Mich. 458.

The case of *McMillon v. R. R. Co.*, 16 Mich. 79, specially relied upon by appellant, recognizes the law to be that notwithstanding a bill of lading is given, it may be shown there was an express oral agreement regarding the shipment.

5th. If it were conceded that the court erred in admitting in evidence a conversation between appellee and the cashier of the Wisconsin Central road to the effect that a mistake was made in delivering the Watervliet shipment to Hull & Co., we are unable to see how it in any way prejudiced appellant. The same may be said as to the refusal of the court to allow appellant to show previous dealings between appellant and appellee, and that in all instances shipping orders and bills of lading were interchanged. None of this evidence could possibly, in our opinion, have changed the result.

6th. As we understand counsel's contention that the court erred in denying the motion in arrest of judgment, it is because the evidence fails to prove the allegations of the declaration—in other words, that there is a variance. The motion in arrest fails to show that any alleged variance was called to the attention of the trial court. This was necessary before it can be available here. The rule is a salutary one, because the plaintiff may amend when the point of variance is made, and thus obviate the objection. *Mayer v. Brensinger*, 74 Ill. App. 475; *McCormick H. M. Co. v. Sendzikowski*, 72 Ill. App. 402, and cases cited.

But it is contended that if the motion in arrest can not

now be availed of, it having been held in *R. R. Co. v. White*, 166 Ill. 378, that when a motion for new trial is general, not specifying any reasons therefor, any existing reason may be urged, that therefore this alleged variance may be availed of under the motion for new trial. We think not; the trial being before the court, a motion for new trial was unnecessary, and besides, it is settled that before a variance can be taken advantage of on appeal, the variance must have been specially pointed out in the trial court, so as to enable the plaintiff to amend and thus avoid it. *Indianapolis & St. L. R. R. Co. v. Estes*, 96 Ill. 470; *Chicago, B. & Q. R. R. Co. v. Dickson*, 143 Ill. 371.

We, however, think there was no variance; that the proof in substance sustains the allegations of the second additional count of the declaration.

7th. Appellant asked the court to hold eleven different propositions of law, all of which were refused, and all except the first, ninth and tenth were marked "Refused as inapplicable." We deem it unnecessary to set out these propositions. From a careful examination of each of them, we think the court was correct in refusing them all as inapplicable to the case at bar, they being predicated on a supposed state of facts not found by the court to exist, except, perhaps, the sixth, which asks the court to hold that the papers introduced in evidence, which were issued by appellant, are bills of lading. If this proposition, as we suppose it did, referred to two receipts issued to appellee for the apples shipped, then perhaps the court erred; but as it was presented it is too indefinite, and was properly refused. In any event its refusal could not have prejudiced appellant. The fact that the court held that the laws of Illinois controlled, is, in our opinion, immaterial, for the reason that the contract of shipment was verbal, and for carriage through from the points of shipment in Michigan to Minneapolis and delivery there to appellee, and it could make no difference whether the laws of Illinois or the laws of Michigan controlled. The judgment is affirmed.

Edward F. Russell v. John Happ et al.

1. **WITNESS—Competency After the Death of the Adverse Party.**—When a party dies pending a suit, the testimony of his adversary, given at a former trial and prior to his decease, can not be admitted as against his executors.

Assumpsit, on a guarantee, etc. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for defendants. Appeal by plaintiff. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

C. J. MICHELET, attorney for appellant.

W. A. HAMILTON, attorney for appellees.

The court committed no error in refusing to allow the defendant to testify. It must be remembered that he was expressly offered the privilege of testifying with respect to those things to which the witness Hamilton had testified, but he refused to avail himself of the opportunity. In support of the rule that, with the exception named, the defendant was not competent to testify "of his own motion or in his own behalf" in this action in which the plaintiffs sue as executors of a deceased person, it is not necessary to do more than cite the statute and a very few decisions under it. It does not matter what the defendant wishes to testify to, or that he has testified on a formal trial, or that he is merely a surety, or that the plaintiff has died *pendente lite*. R. S., Ch. 51, Secs. 2, 3; *Whitmer v. Rucker*, 71 Ill. 410 (412); *Langley v. Dodsworth*, 81 Ill. 86; *Lowman v. Aubrey*, 72 Ill. 619 (622).

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This was an action of assumpsit by Benjamin Emerson against appellant, as the guarantor of a promissory note. John W. Maxwell and Julia E. Maxwell executed to Benjamin Emerson their promissory note, of date January 12,

1889, for the sum of \$500, with interest at the rate of seven per cent per annum, payable to the order of said Emerson four days after the date thereof. Indorsed on the note was the following:

“In case of default in the payment of the within note at maturity, and inability to collect the sum of the makers by due process of law, I hereby become guarantor for the payment of the same.”

“EDWARD F. RUSSELL.”

The makers of the note, to secure payment thereof, executed to appellant, as trustee, a trust deed of certain real property in Potter county, in South Dakota. The note not having been paid at maturity, Benjamin Emerson, the payee of the note, August 24, 1895, commenced in the Circuit Court of said Potter county a suit for the foreclosure of the trust deed, and such proceedings were had in said suit that a judgment or decree was entered therein November 25, 1895, ordering a sale of the premises conveyed by the trust deed. The proceeds of the sale, less costs and expenses paid from said proceeds by order of the court, was \$73.64, which amount was credited on the note.

The declaration contains a special count and the common counts, and in the special count it is alleged, among other things, that John W. Maxwell died in the year 1890, leaving no estate; that Julia Maxwell has no property or money, and that the plaintiff is unable to collect the note from the makers by due process of law.

Prior to the trial resulting in the judgment appealed from there were two trials of the case, the first July 13, 1896, and the second January 18, 1897. April 8, 1897, the death of Benjamin Emerson, the plaintiff in the action, was suggested, and John Happ and John Emerson, his executors and the appellees here, were substituted as defendants. The appellant pleaded the general issue and several special pleas. One of the special pleas alleged, in substance, that the consideration upon which defendant indorsed said note was the delivery to him by plaintiff of a power of attorney, giving defendant power to act in the matter of the collection

of interest and the principal of said note as in his judgment seemed best; and that afterward plaintiff demanded and received from the defendant said power of attorney in consideration that plaintiff should release defendant from all liability on account of his indorsement on said note; that plaintiff did receive said power of attorney from defendant, and that plaintiff did release defendant from all liability on said indorsement.

The last trial occurred May 3, 1897, and appellant's counsel, at the close of the evidence for the appellees, the plaintiffs below made the following offer:

"I offer in evidence the testimony given by the defendant, Russell, and the plaintiff, Emerson, at the former trial of this cause, to prove that shortly after the defendant had entered into the guaranty on the promissory note in this suit, the plaintiff released the defendant from all liability on account of the same; and further, I offer to show that the aforesaid evidence, so given on the former trial, is the only evidence obtainable on the point so offered to be proved."

The court refused to admit the offered evidence, and this is assigned as error, and is the only assignment of error relied on in argument. The appellees were prosecuting the suit as the executors of Benjamin Emerson, deceased. The appellant was the defendant in the action, and by the very terms of the statute he was excluded from testifying unless called as a witness by appellees. He could not testify of his own motion or in his own behalf, or at all, unless called as a witness by the adverse party, viz., by appellees. 3 S. & C., Chap. 51, Sec. 2. And if he, being alive, could not testify of his own motion, his testimony on a former trial was inadmissible.

In *Trunkey et al. v. Hedstrom et al.*, 131 Ill. 204, Trunkey, one of the plaintiffs in the action, testified on the first trial of the cause that he made the contract sued on with one Pratt, the agent of the defendants, and Pratt also testified. Before the next trial it was stipulated between the parties that in any future trial Pratt's testimony might be read in evidence by the defendants as though regularly taken as a

deposition in the cause. Before the next trial Pratt died. Trunkey, on the final trial, was called as a witness by the plaintiffs, but the trial court held him incompetent, and the ruling was sustained by the Supreme Court, the latter court saying: "Whether Trunkey was allowed to testify on the trial, or his former evidence was read to the jury, could make no difference." We regard this as decisive of the question. Russell was not called as a witness by appellees; he could not testify of his own motion, or in his own behalf, unless so called, and if it made no difference whether he testified, or his testimony on the former trial was put in evidence, then his testimony on the former trial was incompetent.

The judgment will be affirmed.

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Julius H. Stevens, Receiver, et al., v. Abram H. Hadfield.

1. **MORTGAGOR—Owner of the Equity of Redemption—Rents and Profits.**—A mortgagor under a decree and sale in foreclosure is the owner of the equity of redemption during the entire period of redemption, and is entitled to the rents and profits after the complete satisfaction of the mortgage debt.

2. **MORTGAGE SALE—What the Purchaser Takes.**—A purchaser at a mortgage sale takes the estate subject to all prior liens, and is required to know that the mortgagor or owner of the equity of redemption will be entitled to the possession and rents of the premises, pending the running of the period of redemption.

Bill of Foreclosure.—Trial in the Circuit Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Hearing and decree; appeal from an order affirming in part the receiver's account. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

STATEMENT.

On June 15, 1894, a bill was filed by Fleming et al. against Shutterly et al., to foreclose a trust deed upon certain improved property in Cook county. Appellee was the owner

Stevens v. Hadfield.

of the equity of redemption, and was made a party defendant. An order was entered in the cause appointing appellant Julius H. Stevens receiver of the premises, with the usual powers of receivers in such cases. A decree of sale was entered on November 13, 1895, and the premises were sold. There was a deficiency and a decree for same. Appellant Charles B. Eggleston purchased at the foreclosure sale, and after period of redemption received a deed.

The receiver remained in possession and collected rents during the period of redemption. There were two other incumbrances, evidenced by trust deeds upon the property, one prior and one subsequent to the trust deed upon which suit was brought. The third trust deed secured an indebtedness due F. P. Burgett, and on February 25, 1896, a bill was filed by him, which was consolidated with this cause. An intervening petition was filed by Eggleston on October 20, 1896, setting up that he had purchased the premises at master's sale; that the receiver had made his report on April 20, 1896, showing disbursements of \$3,735.54; that objections were filed to the report by Burgett and Hadfield; that Hadfield had purchased the premises, and as part of purchase he assumed and agreed to pay the various incumbrances thereon; that any sums paid by the receiver upon interest due on the first mortgage, if held by the court to have been improperly paid, should be ordered paid to petitioner and not to Hadfield, by reason of the assumption of said first mortgage debt by Hadfield, and praying that the petition be referred to the master in chancery to whom the receiver's accounts and report had been referred. The petition was so referred, and on March 5, 1896, the master made his report, in which he states that a warranty deed was introduced in evidence, dated March 1, 1894, from Shutterly to Hadfield, conveying premises in question, and by which Hadfield, the grantee, assumed and agreed to pay incumbrances, including the trust deed of \$20,000, which was the first lien. The master found that the receiver had collected \$3,421.76, and properly disbursed \$3,189.60, and that the balance in his hands of \$232.16 should be paid to Abraham H. Hadfield, the owner of the equity of redemption.

An order was entered by the court upon April 5, 1897, approving the receiver's account in part, allowing some of the items of disbursement and disallowing others. The order concludes as follows: "The court further finds that the total sum collected by the receiver as the revenue from said premises, is the sum of \$3,421.76. Deducting above payments allowed, leaves balance of \$1,882.16. It is further ordered that the above balance of \$1,882.16 be held for the further consideration of the court."

Afterward, on May 25, 1897, Hadfield, appellee, filed his petition in said cause, setting forth that he was the owner of the equity of redemption from the time of the foreclosure sale until the expiration of the period of redemption; that the deficiency had been paid and the deficiency decree satisfied, and praying that the receiver be ordered to pay to petitioner the balance which had been found by the court on April 5, 1897, to be in his hands. Stevens, the receiver, and Fleming, answered the petition. The substance of the answers was to re-assert the propriety of the receiver's disbursements, which had been passed upon and disallowed by the order of April 5, 1897.

On September 3, 1897, the court entered an order finding that Hadfield was the owner of the equity of redemption, and as such was entitled to the balance of rents and profits, and directing that the balance in the hands of the receiver be paid to Hadfield, less \$50 allowed for costs "of this proceeding." From this order Stevens, receiver, and Eggleston, the purchaser at the foreclosure sale, appeal.

JONES & STRONG, attorneys for appellants.

JAMES FRAKE and B. W. ELLIS, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The order of April 5, 1897, by which the various items of the receiver's report were passed upon by the court and allowed or disallowed, and by which a balance of \$1,882.16 was decreed to be in the hands of the receiver, subject to

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the further order of the court, was final. So far as the record discloses, neither of appellants was dissatisfied with this decree. No appeal was taken from it. There then remained nothing but the distribution of the fund, so decreed to be in the hands of the receiver. It is the order of distribution from which this appeal is prosecuted. By that order the fund is decreed to appellee, Hadfield. In this there was no error. Appellee was the owner of the equity of redemption during the entire period of redemption, when this fund accrued from rents and profits. He was entitled to such rents and profits after the complete satisfaction of the mortgage debt, which was foreclosed. That debt was completely satisfied when the deficiency decree was paid, and the balance remaining was properly decreed to appellee. *Davis v. Dale*, 150 Ill. 239.

Appellant Stevens has no rights as to this fund, for his rights were finally disposed of by the decree of April 5, 1897. Appellant Eggleston has no claim to the fund by reason of his being purchaser at the foreclosure sale. He took the estate subject to all prior liens, and he was required to know that the mortgagor, or owner of the equity of redemption, would be entitled to the possession and rents of the premises pending the running of the period of redemption. *Davis v. Dale, supra*.

The cross-errors assigned are as to that part of the decree which appropriates \$50 of the fund in the hands of the receiver to payment of costs of the proceeding, and to the refusal of the court to order interest paid upon the sum in the hands of the receiver.

In neither respect do we think that appellee can complain. The order as to costs in a chancery proceeding is within the discretion of the chancellor. There is no equitable reason why the receiver should be charged with interest. The delay between the settling of his account and the order of distribution is not to be imputed to any fault upon his part.

The decree is affirmed.

West Chicago Street R. R. Co. v. John Dooley, Adm.

1. **JURY—Province of, on Conflicting Evidence.**—Upon a conflict of evidence on material points in a case, it is the province of the jury to decide where the truth lies.

2. **INSTRUCTIONS — Damages—Death from Negligent Act.**—In an action to recover damages occasioned by death resulting from negligence, an instruction which tells the jury that they can allow only such damages as will make good the pecuniary loss sustained by the next of kin of the person deceased, and that mental sufferings, or loss of domestic or social happiness, or the degree of culpability of the defendant, are not proper elements in the calculation of damages. That they can not award exemplary or vindictive damages, but must ascertain from the facts and circumstances in evidence the pecuniary loss sustained in dollars and cents, as nearly as they can approximate thereto, and make that good, is proper.

3. **SAME — Estimating Damages.**—In actions for damages occasioned by death of an infant resulting from negligence of the defendant, it is proper to instruct the jury that in making the estimate of damages they are not limited to the earnings of the deceased until he arrives at the age of twenty-one years, but may take into consideration every reasonable expectation the parents or next of kin may have had of pecuniary benefits or advantage from the continuance of his life so far as the same shall be shown by the evidence in the case.

4. **EVIDENCE—Records of a Coroner's Inquest.**—Where the testimony of witnesses taken before the coroner upon an inquest, is identified by a deputy coroner as having come from the coroner's office, and shown by the witnesses whose statements before the coroner were read, that they testified at the inquest and signed their names to the statements, it is sufficient to justify the admission of such statements in evidence for the purpose of contradicting the testimony of such witnesses.

Trespass on the Case.—Death from negligent act. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff, \$2,500. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

ALEXANDER SULLIVAN, attorney for appellant; B. F. RICHOLSON, of counsel.

CASE & HOGAN and MUNSON T. CASE, attorneys for appellee.

West Chicago St. R. R. Co. v. Dooley.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee, as administrator of his deceased son, William Dooley, brought suit against appellant to recover damages for the negligence of appellant, which resulted in the death of said William at the age of seven years and two months.

A trial before the Superior Court and a jury resulted in a verdict and judgment for \$2,500, from which this appeal is prosecuted. The negligence charged by the declaration was, in substance, that appellant for a long time prior to May 6, 1893, the date of the accident, suffered and permitted a certain excavation to be and remain in the street near and contiguous to its railway tracks on Blue Island avenue near Leavitt street; that thereby and therefrom deceased, while upon Blue Island avenue, in the exercise of due care, necessarily and unavoidably fell by reason of said excavation, his body going under one of appellant's cars, etc.

The first additional count alleges the same negligence, in substance, and further sets up an ordinance of the city giving appellant permission, in order to change its motive power from horses to a cable, to make excavations, etc., in the streets, and making it liable for any damage or injury to any person by reason thereof; and alleges that appellant made excavations, etc., and permitted a large hole or excavation to remain in Blue Island avenue near Leavitt street, for a long time, into which deceased fell, whereby he was thrown upon appellant's track and under one of its cars being operated upon said street, etc.

The second additional count is the same as first additional count, and further alleges, in substance, that it was appellant's duty to keep sixteen feet in width of the street along its line of railway, where two tracks are constructed, on Blue Island avenue, in good repair and condition, but that it failed in this regard, and permitted said street within said sixteen feet to be and remain in bad, imperfect and defective condition, in that a large hole or excavation was permitted to remain in said street within said sixteen feet near its said track unguarded, etc.; and that thereby and therefrom deceased, while in the exercise of due care, fell

into said hole or excavation, etc., whereby he was thrown upon the tracks, his body going under one of appellant's moving cars, etc.

The evidence was conflicting as to the existence, size, shape and location of the hole or excavation at the time of the accident, and as to whether it was the cause of deceased falling under appellant's car, which was being drawn by horses along Blue Island avenue, but we are unable, after a full and careful consideration, to say that the jury were not justified in believing, from the evidence, that there was a hole in the street alongside of appellant's tracks, made by appellant's employes, and within the sixteen feet which was under the supervision and control of appellant, and that the hole was the cause of deceased stumbling and falling under appellant's moving car, thereby causing the injury which resulted in the child's death. In view of this conflict in the evidence, the jury would, if they believed appellant's witnesses, have been justified in finding for appellant on this question, but it being a matter peculiarly within the province of the jury, we do not feel justified in disturbing the verdict.

Complaint is made that the court refused to give appellant's eighteenth instruction as asked, but modified it, because, it is claimed, there was no evidence to justify the instruction as modified by the court. The contention is not tenable. The instruction as given is, viz.:

"18. The court instructs the jury that the defendant had no jurisdiction or control over any part of the street in question at the time and place in question except the sixteen feet occupied by its two tracks and right of way, and no duty was imposed on the defendant to fill up or repair any defect or hole in the street outside of the sixteen feet which was occupied by its two tracks and the six inches on the outside of each of its two tracks, which constituted the defendant's right of way.

So, if the jury believe from the evidence in this case, that plaintiff's intestate at the time and place in question was injured so that his death resulted from such injuries, by

West Chicago St. R. R. Co. v. Dooley.

reason of his stepping into a hole in the street at the time and place in question, outside of the sixteen feet, which was not caused by default or negligence of the defendant, then you should find the defendant not guilty."

The witness Hartnett testified, viz.: "From a point about seventy-five feet west of Leavitt street on Blue Island avenue, to a hundred feet west, there were several stones out of place along the track; they had been out, to my knowledge, a month before the child was killed there. I seen men working along the track there. Men were engaged in getting the track into shape for the cable cars. I saw the place from seventy-five to one hundred feet west of Leavitt street, on Blue Island avenue, once a day at least, until Willie Dooley was killed. Those stones adjoined the rails. Blue Island avenue runs southwest on a slant. I saw them taking the stones out on the north side of the north rail going west. I remember that was about a month before Willie was killed, because at that time I was working in McCormick's, and I was just off about one month, out of work about one month, at the time the child was killed. Not to my knowledge, from the time I saw the stones taken out until I heard he was killed, were there any stones put back there at that point. I crossed that track at least once a day. I am not positive whether I crossed the track the day he was killed or not. I went across the track the day before he was killed at that point. The holes were there the day before.

"I couldn't say when these men began working on the track; they were working there about a month before the boy was killed; taking up stones was some of their occupation; they worked getting the track in shape for the cable cars; they didn't take up these particular stones more than once; I don't know when they took those particular stones out. Probably five or six were taken out there a month before this accident occurred; I don't know how many were removed during that month; I know there were other stones taken out, and they were put back again."

This evidence was not controverted by appellant.

It is contended that there was error in modifying, and giving as modified, appellant's nineteenth and twentieth instructions. As given they were, viz.:

"19. In this case if you find for the plaintiff you can allow only such damages as will make good the pecuniary loss sustained by the next of kin of the person deceased. The mental sufferings, or loss of domestic or social happiness, or the degree of culpability of the defendant are not proper elements in the calculation of damages. You can not award exemplary or vindictive damages. You must ascertain from the facts and circumstances in evidence the pecuniary loss sustained in dollars and cents, as nearly as you can approximate thereto, and make that good. In making the estimate of damages you are not limited to the earnings of the deceased until he should arrive at the age of twenty-one years, but may take into consideration every reasonable expectation such parents and next of kin may have had of pecuniary benefits or advantages from the continuance of his life so far as the same shall be shown by the evidence in this case.

"20. The court instructs the jury that if they believe from the evidence that the injury which caused the death of the plaintiff's intestate was the result of an accident which occurred without the fault or negligence of the defendant, or that the plaintiff's intestate, if of sufficient age and intelligence to exercise proper care for his safety, was (or that both the plaintiff's intestate, if of such age and intelligence, and the servants of the defendant were) at fault, they should find the defendant not guilty."

We are unable to detect any error in these instructions as given, and counsel have failed to cite any adjudicated case holding that they are erroneous.

It is argued that there was error in admitting in evidence the city ordinance with reference to the duty of the railway company to keep sixteen feet in width of the street along the line of its railway, where two tracks are constructed, in good repair and condition, etc., because, it is claimed, it was immaterial and confusing to the jury. We do not so regard

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it in view of the allegations of the declaration above set out, and besides it was argued to the court, and an instruction to the jury was asked to the effect, that if the hole in question was outside this sixteen feet the company was not liable. Appellant can not now claim the ordinance was immaterial or confusing. *Wheatley v. Savings Bank*, 167 Ill. 484.

Appellant claims the court erred in admitting in evidence on rebuttal the testimony of certain witnesses taken before the coroner upon an inquest upon the body of William Dooley, appellee's intestate, because it was not sufficiently proven, for the various reasons claimed in the brief of counsel. It was identified by a deputy coroner as the testimony taken at the inquest upon the body of William Dooley, May 8, 1893, and it was testified that it came from the office of the coroner. It was also shown by the witnesses whose statements before the coroner were read, that they testified before the coroner at the inquest, and that they respectively signed their names to said statements. This, we think, was sufficient to justify the court in admitting the statements in evidence by way of contradiction of the testimony of these witnesses. *R. R. Co. v. Feehan*, 149 Ill. 215; *Craig v. Rohrer*, 63 Ill. 326.

The judgment is affirmed.

Joseph Shampay v. City of Chicago.

1. ORDINARY CARE—*Exercise of, a Question for the Jury.*—The question as to whether the plaintiff was in the exercise of ordinary care is for the jury.

2. INSTRUCTIONS—*When Not Reversible Error.*—An instruction improperly given on a point not arising in the case, unless it is calculated to mislead the jury or prejudice them against the opposite party, is not reversible error.

Trespass.—Injuries to personal property. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for defendant. Plaintiff appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

B. M. SHAFFNER, attorney for appellant.

MILES J. DEVINE and QUIN O'BRIEN, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellant brought suit against appellee to recover for the loss of a horse through the alleged negligence of appellee. The negligence charged was in permitting a public street, viz., the intersection of Washington and Jefferson streets, in the city of Chicago, to be in an unsafe condition, in that there was an opening or runway between the curbstone and the pavement, which was used to drain water into the sewer. Into this opening appellant's horse stepped, and as a result thereof, a leg of the horse was broken. At the time of the accident appellant, accompanied by his son, was driving. Both appellant and his son were familiar with the locality, and knew of the alleged defect in the street, viz., the opening or runway. The cause was submitted to a jury and a verdict for appellee was returned. It is urged that the verdict is against the weight of the evidence. To this we can not assent. It was undisputed that appellant knew of the alleged defect. While his knowledge might not *per se* preclude a jury from finding that he was in the exercise of ordinary care, yet it did not preclude a finding that he was not in the exercise of such care. We think the latter finding the one more consistent with the facts as they appear from the record. Whether the jury so found as to contributory negligence of appellant, or based their verdict upon a finding that there was no negligence upon the part of the city, we could in neither event say that the verdict was against the weight of the evidence. The runway or drain was not such an opening as can be declared by the court to have been a defective condition, the permitting of which would constitute negligence.

The third, fifth and sixth instructions tendered by the appellee and given by the court, are complained of. We see no fault in any of them, which would have been likely to

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prejudice appellant. It was unnecessary to refer to the duty of the city, as to walks or bridges, when instructing as to its duty in relation to streets; but no harm could have resulted therefrom. The other objections to these instructions are not tenable.

The judgment is affirmed.

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Marder, Luse & Co. v. Campbell Printing Press and Mfg. Co.

1. **APPEALS—*The Right Statutory.***—The right of appeal is purely statutory and the statute must be complied with or the right is gone.

Debt, on a foreign judgment. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Judgment on verdict for plaintiff. Debt \$325.45, damage \$157.30. Appeal by defendant. Heard in this court at the March term, 1898. Appeal dismissed. Opinion filed May 26, 1898.

M. BRYANT and M. BLANCHARD, attorneys for appellant.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee brought an action in debt on a foreign judgment against appellant in the Superior Court, and after a trial before the court and a jury, a verdict was rendered against appellant for debt, \$325.45; damages, \$157.30; and motion for new trial was made by defendant.

Afterward, on February 27, 1897, being the last day of the February term, 1897, of the court, the motion for new trial coming on to be heard, defendant's counsel being absent for the reason that he did not know the hour when court convened (9:30 A. M.), was overruled and judgment entered on the verdict.

At 10 A. M. of said day, counsel for defendant came into court and entered a motion to vacate the order overruling the motion for new trial, and to vacate the judgment, which motion was continued to the next term of the court.

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Afterward, on March 17, 1897, at the March term of the court, arguments were heard on both the motions, but the court refused to vacate the order overruling said motion for a new trial, and to vacate said judgment entered thereon, and ordered "that the motion of the defendant to set aside the judgment, and the order overruling the motion for a new trial heretofore entered herein of record be and the same is hereby overruled and denied." To this action of the court the defendant excepted and prayed "an appeal from the judgment of this court to the Appellate Court," etc. This evidently is an appeal from the judgment of the court entered February 27, 1897, at the February term, and not an appeal from the order of the court overruling the motion of defendant to set aside the judgment and the order overruling the motion for new trial. But if there were any doubt as to this, it is removed by the appeal bond filed April 15, 1897, which recites the recovery of the judgment on February 27, 1897, of the February term, 1897, and that from said judgment appellant prayed for and obtained an appeal to this court. There is, then, no appeal from the order of March 17, 1897, nor any appeal prayed during the February term of the Superior Court from its judgment of February 27, 1897. This state of the record leaves this court without jurisdiction to consider any of the assignments of error of appellant.

The statute (Ch. 110, Sec. 68) is imperative that "appeals shall be prayed for and allowed at the term at which the judgment, order or decree was rendered." The right of appeal is purely statutory, and the statute must be complied with or the right is gone. *Nat'l Ins. Co. v. Chamber of Commerce*, 69 Ill. 22; *Guyer v. Wilson*, 139 Ill. 399; *Greeve v. Goodson*, 142 Ill. 355; *Tedrick v. Wells*, 152 Ill. 217, and cases cited.

There being no appeal from the order of March 17, 1897, and the attempted appeal from the judgment being a nullity, it follows that the appeal must be dismissed, which is done of the court's own motion. *Wright v. People*, 92 Ill. 596; *Hart v. Burch*, 31 Ill. App. 22.

Appeal dismissed.

William J. Moore and Cornelia Moore, Executor and Executrix, etc., v. Chicago Guaranty Fund Life Society and Minnie Zollinger.

1. **BENEFIT SOCIETIES.—Assignment of Certificates.**—It is not necessary that the assignee of a certificate of insurance issued by a beneficiary society organized under the act of 1883 (2 S. & C. Stat. 1896, p. 2278) should have an insurable interest in the life of the assured.

2. **SAME—Act of 1893 Has No Retrospective Effect.**—The “Act to provide for the organization and management of fraternal benefit societies,” etc., approved and in force June 22, 1893, (2 S. & C. Stat., 1896, p. 2278), does not apply to certificates issued prior to its passage.

3. **SAME—Effect of Assignment of the Certificate.**—The conditions of the approval of the assignment of a beneficiary certificate are the acts of the society, and no part of the contract with the assured; they can not have the effect of limiting the right of the assured to change the beneficiary.

Bill of Interpleader.—Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Hearing and decree. Appeal by the unsuccessful party. Heard in this court at the March term, 1898. Opinion filed May 26, 1898.

BEACH & BEACH, attorneys for appellants.

WALTER OLDS and CHARLES F. GRIFFIN, attorneys for appellee Minnie Zollinger.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The Chicago Guaranty Fund Life Society, a corporation organized under an act of the legislature of this State, in force July 1, 1883, entitled “An act to provide for the organization and management of corporations, associations, or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs, relatives and devisees of deceased members,” etc. (Hurd’s Stat. 1885, p. 732), and reorganized under an act entitled “An act to provide for the organization and management of fraternal

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beneficial societies," etc., approved and in force June 22, 1893 (2 S. & C. Stat. 1896, p. 2278), issued to James E. Moore, December 17, 1892, a certificate or policy of insurance insuring him in the sum of \$5,000, the said sum to be paid to his estate in the event of his death and satisfactory proof thereof. December 24, 1892, James E. Moore assigned the certificate to the appellee, Minnie Zollinger. The Guaranty Fund Life Society indorsed on the instrument of assignment the following:

"The Chicago Guaranty Fund Life Society hereby consents to the above assignment, subject to the following conditions: That a legal insurable interest must be shown by all claimants at time of claim hereunder, and claims made by any creditor or assignee shall not exceed the amount of the actual *bona fide* indebtedness of the member to him, together with any payments made to the society under the certificate or policy by said creditor, with interest at six per cent.

CHICAGO,18....

CHAS. I. WESTERFIELD,
Secretary."

The charter of the society contains the following:

The object for which this corporation is formed is to furnish life indemnity or pecuniary benefits to widows, orphans, heirs, or relatives by consanguinity or affinity, and devisees or legatees of deceased members, and to raise funds for the payment of such benefits in whole or in part by assessments on the surviving members.

November 21, 1895, James E. Moore died, and the company received satisfactory proofs of his death. It appears from the evidence that deducting from the amount of the sum insured certain sums due the company, there was due on the policy \$4,214.30. This amount was claimed by the appellants William J. Moore and Cornelia Moore, as executor and executrix of James E. Moore, deceased, and by Minnie Zollinger, as assignee of the policy, and March 15, 1897, the society filed a bill of interpleader making appellants and Minnie Zollinger defendants, praying, among

other things, that they should set forth their claims, respectively, and offering to pay the amount due on the certificate to whomsoever the court should decree was entitled to the same, etc. The defendants answered the bill, issues were made up and the cause referred to a master to take proofs and report the same, with his opinion as to the law and the evidence. The master reported that at the time of the assignment of the certificate to Minnie Zollinger, James E. Moore was not indebted to her, and that she had not, at that time, any insurable interest in his life, but that, in his opinion, it was not necessary to the validity of the assignment that she should have had such insurable interest; that the assignment was valid and effectual, and that she was entitled to the insurance money as against appellants, and he so recommended. Exceptions were filed by appellants to the master's report, which the court overruled, affirmed the report, and rendered a decree as recommended by the master. The mainly contested question of fact between appellants and appellee Zollinger, was as to whether James E. Moore, at the time of the assignment of the certificate, was or not indebted to appellee Zollinger. We will not discuss the evidence on that question, for reasons which will hereinafter appear.

Appellants' counsel, in their argument, advance the following propositions:

"As there was no consideration for the alleged assignment of the policy or certificate, and no indebtedness existing on the part of James E. Moore, deceased, to the defendant Minnie Zollinger, and the defendant Minnie Zollinger had no insurable interest in the life of the deceased, James E. Moore, the alleged assignment was invalid, null and void, for the reason that the defendant Minnie Zollinger is not one of the persons named by the statute under which the complainant company was organized, nor in the articles of incorporation of the said society, for whose benefit the funds of said society were to be raised."

These propositions involve two questions, viz.: Was it

necessary to the validity of the assignment that Minnie Zollinger should have had, at the time of the assignment, an insurable interest in the life of James E. Moore? Was the assignment to Minnie Zollinger in violation of the law under which the society was organized? Appellants' counsel, in support of the proposition that the assignment was in violation of the statute, cite and rely both on section 1 of the act of 1883, and section 1 of the act of 1893. This, doubtless, for the reason that it is admitted by the pleadings that the society was organized under the former and reorganized under the latter act. But we deem the latter act inapplicable to the certificate in question. The certificate was issued, as before stated, December 17, 1892, and as the act of 1893 did not take effect until June 22, 1893, the society could not have reorganized under the latter act until after that date. It does not appear either by the pleadings or the evidence when the society reorganized under the act of 1893, and *non constat* but that such reorganization was subsequent to the assignment in question.

In Voight v. Kersten, 164 Ill. 314, a certificate was issued January 14, 1893, by the High Court of the Independent Order of Foresters, to one Paul Anton Fischer, who subsequently, and about October 19, 1894, applied to the society for permission to substitute Anna Rosina Kersten for Fischer, as the beneficiary in the certificate, which permission was refused. Fischer died October 30, 1894, and Voight and Anna Rosina Kersten both claiming the insurance money, the society filed a bill of interpleader, making them defendants. The society was originally organized under an act in force July 1, 1887, and under that act and the by-laws of the society, either Voight or Kersten might have been a beneficiary. After the issuance of the certificate and after the act of 1893 was passed, the society adopted the provision of the latter act, under which neither Voight nor Kersten could be a beneficiary, neither of them being of the description of persons described in that act, and to whom death benefits were limited by the act. The court held that the act of 1893 was not intended to have

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a retrospective effect, and did not affect certificates issued prior to its passage, saying: "At the time the contract was made between the deceased and the complainant order, this right to appoint the beneficiary or change the name existed, and, we think, was an important part of the contract entered into. It would seem that the construction of the act passed June, 1893, giving it the effect to destroy that right of appointing a beneficiary, or naming another beneficiary, which existed in favor of the deceased under his contract prior to the passage of the act, would be to give the act a retrospective effect, and destroy the obligation of the contract entered into between the deceased and the complainant," etc. This eliminates from consideration the act of 1893.

Section 1 of the act of 1883 is as follows:

"That corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs or relatives by consanguinity or affinity, devisees or legatees of deceased members, or accident or permanent disability indemnity to members thereof, and where members shall receive no money as profit, and where the funds for the payment of such benefits shall be secured, in whole or in part, by assessments upon the surviving members, may be organized subject to the conditions hereinafter provided." Starr & Curtis' Statutes of 1885, Ch. 73, Par. 122, Vol. 1, page 1348; Hurd's Stat. 1885, Ch. 73, Par. 125, p. 732.

It will be perceived that devisees or legatees are among the classes named who may be beneficiaries. This section has been construed by the Supreme Court in several cases.

In *Benefit Association v. Blue*, 120 Ill. 121, the contest was between Blue, the beneficiary named in the certificate, and the benefit association. It appears from the brief filed for the benefit association that its counsel urged as grounds for the reversal of the judgment, that the contract was void for the reason that Blue had no insurable interest in the life of the assured, and that he could not be a beneficiary, he not being within any class named in the statute.

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Ib. 122. The court held, citing a number of cases, that it was not necessary that Blue should have had an insurable interest in the life of Bailey, the insured; that Bailey had an insurable interest in his own life, and had a right to procure a policy on his life, and, also, unless some principle of public policy was violated, to make it payable, in case of his death, to any person whom he might desire. The court also held that it was not contrary to public policy for Bailey, the assured, to make the policy in question payable to Blue, saying: "The first section of the act under which the defendant is organized, in express terms authorizes the organization of such associations for the purpose of furnishing life indemnity or pecuniary benefits to devisees or legatees. If, as is plain from the language of the statute, a person may take out a policy on his own life, and devise such policy to a stranger, what principle of public policy would be violated by a provision in the policy making it payable to a stranger, in lieu of doing the same thing by will? If the policy may be made payable to a stranger who has no insurable interest in the life of the insured, as it may be by statute, we perceive no reason which will prevent the same thing being done by a clause the insured may have inserted in the policy at the time the insurance is procured." The court further held that as between Blue, the beneficiary, and the association, the latter, having received the full benefit of the contract, was estopped to claim that Blue was not within any of the classes named in the statute, and that the contract was *ultra vires*, which last holding has no application to the present case. In *Martin v. Stubbings*, 126 Ill. 387, however, the court went further. The contest in that case was between Mrs. Martin, the widow of the assured, who was named in the certificate as beneficiary, and Stubbings, an assignee of the certificate, they having been made parties defendant to a bill of interpleader filed by the Knights Templars and Masons' Life Indemnity Company, which company had issued a certificate to Neal K. Martin, deceased. The court say: "The assignment of the certificate of membership to Stubbings is not within the

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strict letter of the statute, but in the absence of all negative words forbidding the appointment of a beneficiary in any other mode than the one prescribed, the assignment to him is not necessarily unlawful, and therefore void. He was a person capable under the statute of becoming a beneficiary, and the absolute right of naming him as such was in Martin. His failure to adopt the mode prescribed by the statute, that is by executing a will making Stubbings his legatee, was doubtless a matter to which the society could probably object, but Mrs. Martin had no rights in the certificate which could justify her in interposing an objection. She was to all intents and purposes a stranger to the transaction. Her rights could only arise upon the death of Martin, and then only in case he had wholly failed to make a valid and effectual appointment in her place."

In the last case, while the court held that there was a consideration for the assignment by Martin to Stubbings, namely, an indebtedness of the former to the latter, the court also held that an insurable interest in Martin was not essential to the validity of the assignment (*Ib.* 406), and this is clearly so, because by the letter of the statute any legatee may be a beneficiary, and a testator's power to name his legatees, who may be beneficiaries, is not limited by the statute.

Palmer v. Welch, 132 Ill. 141, and *Alexander et al. v. Parker*, 144 Ill. 355, relied on by appellants' counsel, are not in the least inconsistent with the prior cases cited, nor is either of them in point. In both cases, the society which issued the benefit certificate was organized under and by virtue of a statute of the State of Massachusetts, and the court, in determining the rights of the parties, applied the Massachusetts statute as construed by the Supreme Court of that State.

Appellant's counsel also rely on a condition annexed to the certificate and the conditional approval of the assignment heretofore quoted. The condition is as follows:

"No assignment of this policy shall be valid unless approved in writing by the secretary and a duplicate copy

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filed at the home office. Claim made by the assignee shall be subject to proof of interest and the amount recoverable thereunder by such assignee shall be limited to the value of the interest proven. The society shall not be responsible for the validity of any assignment."

On the hypothesis that this is a part of the contract, the question is, to what character of an assignment does it refer. Does it refer to an assignment made for the purpose of changing the beneficiary? The language "Claim made by the assignee shall be subject to proof of interest and the amount recoverable thereunder by such assignee shall be limited to the value of the interest proven," clearly shows that the character of the assignment contemplated and intended by the parties was an assignment by the assured to a creditor to secure the claim of the latter, and that an assignment for the purpose of changing the beneficiary was not contemplated or intended by condition 20. This view is strengthened by condition 19, which is as follows: "The insured may, with the approval of the secretary, upon surrendering this policy, change the beneficiary hereunder to any person having a legal insurable interest in the life of the insured, in which event the within named beneficiary shall have no claim whatsoever on the society." The assignment is absolute, and does not purport to be as security. Condition 19 is not in terms prohibitory of a change of the beneficiary in another mode than that mentioned in it, nor of the naming a beneficiary who has no legal insurable interest in the life of the insured; and the Supreme Court having held that a person having no insurable interest may be made a beneficiary, and that, within the spirit of the statute, this may be done by assignment of the certificate, and that the society only could object to the mode of changing the beneficiary by assignment, and the society not objecting to that mode in the present case, we are of opinion that objections to the assignment based on condition 20 are untenable. The conditions annexed to the approval of the assignment evidently refer only to an assignment as security to a creditor. The language is that "a legal insurable

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interest must be shown by all claimants at time of claim hereinunder, and claims made by any creditor or assignee shall not exceed the amount of the actual *bona fide* indebtedness of the member to him," etc. These conditions of approval of the assignment are the act of the company, are no part of the contract with the assured, and can not have the effect of limiting the right of the assured to change the beneficiary. The society could not, after the issuance of the certificate, curtail this right. *Voight v. Kersten*, 164 Ill. 314, 320.

The master found, and appellant's counsel insists, that appellee Zollinger was not a creditor of the assured, and had no insurable interest in his life, which being true, neither condition 20, nor the conditions of the approval of the assignment, could apply to her.

The decree will be affirmed.

**Thomas Edwin Allaire, an Infant, by Ada A. Allaire,
His Next Friend, v. St. Luke's Hospital, and
St. Luke's Free Hospital.**

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1. **INFANTS—*Injuries While in Ventre de sa Mere.***—An infant can not maintain an action for injuries received by it while in its mother's womb.

2. **SAME—*Regarded as in Esse by the Civil Law.***—The doctrine of the civil law and the ecclesiastical and admiralty courts, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which does not appear to have been indulged in by the courts of common law, to the extent of allowing an action by an infant for injuries occasioned before its birth.

MR. JUSTICE WINDES, dissenting.

Trespass on the Case, for injuries received before birth. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Judgment for defendant on demurrer; appeal by plaintiff. Heard in this court at the March term, 1898. Affirmed. MR. JUSTICE WINDES, dissenting. Opinions filed May 26, 1898.

PHILETUS SMITH, attorney for appellant.

“Life is the immediate gift of God, a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as the infant is able to stir in its mother's womb.” 1 Blackstone, 130.

“An infant *en ventre sa mere* is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copy-hold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were actually born.” 1 Blackstone, 130; *Thellusson v. Woodford*, 4 Vesey, Jr., 227, 319, 323.

“A child *in utero* is considered as living for its own benefit, but not to a fixed period of time.” 2 De G., J. & S., 665.

“The principal aim of society is to protect individuals in those absolute rights which were vested in them by the immutable laws of nature. Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.” 1 Blackstone, p. 105, *Brown & Hadley's Commentaries—Waite's Notes*.

“The absolute rights of individuals are those that belong to their persons in a state of nature, and which every person is entitled to enjoy.” 1 Blackstone, 130.

In *Phillips v. Herron*, 55 Ohio St. 478, 45 N. E. Rep. 720, it was held that a child quick *in utero*, is a person in being. The case was one involving a construction of the Ohio statute of 1811, which in substance limits the entailment of property to “persons in being,” and the question (on construction of a will) in substance was, whether or not the grandson, Maurice Dudley Phillips, quick *in utero* at the testator's death, was a “person in being” or not, under the statute named, the decision being that, within the meaning of the act, a child *in utero* at the testator's death is in being.” *Turley v. Turley*, 11 O. S. 173; *McArthur v. Scott*, 113 U. S. 340.

“Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law,

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right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay." Constitution of Illinois, 1870, Sec. 19, Art. 2, Bill of Rights.

LINDEN EVANS, attorney for appellees, contended that there is no statute nor any common law authority to sustain this action. *Dietrich v. Inhabitants, etc.*, 138 Mass. 14; *Walker v. Great Northern Ry. Co.*, 28 L. R. (Ire.), 69; Francis' Legal Maxims.

The alleged analogy in chancery, although academic, is inapplicable. *Grotius de Equitate*, Sec. 3; *Heard v. Stamford*, *Cas. Temp. Talb.*, 173, on p. 174; *Pomeroy's Eq. Jur.*, Sec. 425; *Story's Eq. Jur.*, Sec. 616; 10 and 11 William III., Chap. 16; *Palmer v. Cracroft*, 2 Vern., part II., 580.

The alleged analogy from criminal law is inapplicable. *Hale, P. C.*, 433; *Rex v. Enoch*, 5 Car. & P. 539; *Rex v. Poulton*, 5 Car. & P. 329; *Rex v. Brain*, 6 Car. & P. 349; 4 Blackstone Com., *p. 198; *Year Books*, 1 Edw. III., 23 Pl. 18; *Fitz. Abr.*, *Enditement*, Pl. 4; *Fleta I*, Ch. 35, Sec. 3; *Ill. Crim. Code*, Sec. 3.

The alleged analogy from civil, ecclesiastical and admiralty law is inapplicable. *Wharton, Neg.* (1874), Sec. 9a, 10; *Benedict's Adm'r*, 58, Secs. 111-113.

The declaration fails to show any legal duty of the defendants, as a hospital, to the plaintiff, or any breach thereof. *Feoffees v. Ross*, 12 Clark & F. 506; *Holliday v. St. Leonards*, 11 C. B. (N. S.) 192; *Gooch v. Association*, 109 Mass. 567; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; *Union Pacific Ry. Co. v. Artist*, 60 Fed. Rep. 365; *Hughes v. Munroe (N.Y.)*, 4 N.E. Rep. 407; *Joel v. Woman's Hospital*, 35 N.Y.S. 37; *Downs v. Harper*, 25 L. R. A. 602; *Williamson v. Louisville, etc.*, 23 L. R. A. 200; 15 Ky. 629.

The plaintiff is estopped by the settlement with his mother. *A. & E. Ency.*, Vol. 16, p. 476; *Dietrich v. Inhabitants, etc.*, 138 Mass. on p. 17; *Fleta I*, Ch. 35, Sec. 2.

The proof of plaintiff's case is impossible. *American Text Book of Surgery*, 271; *American Text Book, Children's*

Diseases, 518, 771 and 818; Darwin's Descent of Man; Drummond's Ascent of Man; Havelock Ellis, Man and Woman; Beck. Med. Jour., Vol. I, 383; Wharton Ev. (2d Ed.) Vol. I, Sec. 441; Tracey Peerage, 10 Cl. & F. 1 *p. 191; Coke upon Littleton, 29 b; Paine's Case, 8 Rep. 34 (Law Inst. Ed., Vol. 4, p. 207).

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The amended declaration in this case, omitting the caption, is as follows:

“ The said plaintiff, Thomas Edwin Allaire, an infant of tender age, by Ada A. Allaire, his next friend, and Philetus Smith, his attorney, by leave of the court first had, for amended declaration, complains of the said defendants, both bodies politic and corporate, and doing business at the city of Chicago, in said county, under and by virtue of the laws of said State, in a plea of trespass on the case: For that, heretofore, to-wit: On or about the 2d day of February, A. D. 1896, at and in the said city, said defendants were possessed of and using a certain building there situate as a hospital for the care, curing and treatment of sick persons, and of ladies therein, during the time before, at and after accouchment and parturition and until convalescence thereafter, and for the care, careful treatment and medical diligence in the safe delivery of infants in *ventre de sa mere*, all for hire and reward in that behalf. And the said Ada A. Allaire, then within ten days, as near as may be, for the natural birth of plaintiff, as the said defendants then and there well knew and had knowledge, then and there, on said last named day, at the request and solicitation of the said defendants, for hire and reward in that behalf to be paid by her, became and was a patient of said defendants in said building, therein to be carefully kept, cared for, housed and medically treated until the birth of plaintiff, and during her convalescence thereafter; and for such hire and reward so to be paid, then and there became and was such patient of defendants, for the use and benefit of plaintiff, in that he

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also should receive from said defendants all due care and treatment, and should be safely delivered by birth, in the course of nature, without personal harm.

And thereupon it then and there became and was the duty of defendants to carefully and comfortably house, shelter and keep the said Ada A. Allaire in said building, and to extend to and bestow upon her person great care and diligence before, during and after plaintiff's birth. All this for the well-being of the said Ada A. Allaire, as also for the benefit of the plaintiff, to the end and purpose that he also should receive great and due care from said defendants and be naturally born of his mother without injury or harm to his person.

And the plaintiff further avers that before, on and after the day first aforesaid, at and in the said building, the said defendants were possessed of and using a certain elevator, so called, for the conveyance of patients therein through a shaft from one floor of said building to other floors therein; and the said Ada A. Allaire, then being such patient, as aforesaid, on said day last named, and in obedience to defendants' request and direction so to do, entered into said elevator and upon the floor thereof, and then and there sat down upon a common, all-wooden chair on said floor, that had there been placed in its then position by defendants, to be carried and elevated thereon from the second floor of said building to the floor of the obstetrical department thereof above said second floor, she then and there being assured by defendants that it was and would be perfectly safe for her to be seated in said chair in its then position, to be carried upward in said elevator, and that no harm could come to her for so doing, defendants then and there well knowing that said Ada A. Allaire was then and there near to confinement for the natural birth of plaintiff.

And thereupon it became and was the duty of defendants to have and keep said elevator and shaft and each and every part thereof, in a proper, safe and secure condition, and to keep the said mother of plaintiff and the plaintiff, safely and without personal harm or injury in the use and

enjoyment thereof, and to so place and condition the said mother therein and upon said floor and chair, as that neither she nor the plaintiff, then in *ventre de sa mere*, should in any way be injured or personally harmed while therein and being carried thereby to said floor above, whither the said mother was then and there directed by defendants. Yet the defendants did not, nor would regard their duty in that behalf, but on the contrary thereof, negligently and carelessly, at the place and on the day last named and when and while the said mother of plaintiff, with all due care on her part, was then and there so conditioned and seated in said chair and being rapidly carried upward in said elevator, failed and neglected to have and keep said shaft, elevator and chair in a safe and secure condition and position, and to have and keep the car of said elevator enclosed, and then and there, carelessly, negligently and heedlessly failed to properly load and operate said elevator, and did then and there so carelessly and negligently operate the same that when and while the said Ada A. Allaire was so being rapidly carried upward therein and thereon, the top of said chair, suddenly and with great force, struck a projection in and on the side of said shaft, whereby said chair, with said mother thereon sitting, was instantly and with great power, crushed to the floor of said elevator car, said car then and there being unenclosed and open, and said mother of plaintiff and the plaintiff then and there with great force and violence thrown and hurled from and off said chair to the floor of said car and to the edge of said floor opposite said chair, and by reason thereof and the swift upward motion of said elevator car, the left limb of said mother was then and there and thereby thrown and caught between the edge of said floor and a projection in said shaft, and was then and thereby greatly cut, mangled, bruised, and the bones thereof broken, and said mother greatly and grievously bruised, hurt, jammed and wounded in her left hip, thigh, side and body, and other great personal injuries, by reason of said negligence of defendants, said Ada A. Allaire then and thereby received and sustained; and that

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said mother, by reason of her said personal injuries, and the manner, way and time in which the same were so received and sustained, was then and there put in great terror and fear that death was then for herself and plaintiff, then unborn. So that and thereby, and as the direct, proximate and natural cause of said injuries to his said mother, said plaintiff was then and there, and by reason of defendant's said negligence, greatly injured, strained, bruised and wounded in his left limb, left side, left hip, left arm and left hand, so that at his birth on the 6th day of February, A. D. 1886, his left foot, left limb, left side and left hand were, and became, and hitherto have been, and still are, wasted, withered and atrophied, and his said foot smaller than natural by more than one-half, and made thereby to turn inward and the sole thereof upward, and his said limb shorter than natural by more than four inches, and his said hip, side and arm, by reason of said negligence and injuries, became and are made shrunken, atrophied and paralytic, and his said limb without flesh thereon, and from thence hitherto have so been and still are, and said plaintiff thereby greatly and sadly crippled for life, and in endeavoring to be cured and healed of his said injuries, has laid out and expended the sum of two thousand dollars (\$2,000) and more (the said Ada A. Allaire having heretofore, for a valuable consideration, settled with the said defendants for, and released them from, all damages from said injuries to herself alone), to the damage of the plaintiff in the sum of fifty thousand dollars (\$50,000), and therefore he brings his suit," etc.

A general demurrer was filed by the defendants, which was sustained by the court, and judgment was rendered for the defendants.

The action is not given by any statute, and if maintainable, it must be so by the common law, and therefore the question is, whether at common law the action can be maintained. Had the plaintiff at the time of the alleged injury, in contemplation of the common law, such distinct and independent existence that he may maintain the action,

or was he, in view of the common law, a part of his mother? If the former, it would seem the action can be maintained; but if the latter, not, because, if part of his mother, the injury was to her and not to the plaintiff.

Appellant's counsel has argued the case learnedly and with not a little industry, but has cited only two cases in which it was attempted to maintain actions involving the question presented here, namely: Dietrich, Administrator, v. Inhabitants, etc., 138 Mass. 14, decided in 1884; and Walker v. Great Northern Ry. Co., 28 L. R. (Ireland) 69, decided in 1891.

In the former case the facts were that the mother, when advanced four or five months in pregnancy, slipped and fell by reason of a defect in the highway, the consequence of which was a miscarriage. The plaintiff was alive when delivered, but was too little advanced in foetal life to survive its premature birth. The action was brought by the administrator of the deceased infant under a statute authorizing an action for the benefit of the mother or next of kin.

The trial and Supreme courts both held that the action could not be maintained, the latter court saying: "Taking all the foregoing considerations into account, and, further, that, *as the unborn child was a part of the mother at the time of the injury*, any damage to it, which was not too remote to be recovered for at all, was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning."

In Walker v. Great Northern Ry. Co., the statement of claim was, substantially, that Annie Walker, the mother of the plaintiff, while quick with child, viz., the plaintiff, became a passenger on the defendant's railway and was so received by the defendant, and that the defendant so carelessly and negligently conducted itself in carrying said Annie Walker and in managing its railway, that the plaintiff was thereby injured, crippled and deformed. A demurrer was sustained to the statement of claim, all the judges concurring in the opinion that it was defective in not showing a contractual relation between the plaintiff and the railway company, but

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merely averring a contract between the mother of the plaintiff and the company. The question, however, whether such an action could be maintained by an infant, in its mother's womb at the time of the alleged injury, could, under any circumstances, be maintained, was discussed elaborately and with great learning both by court and counsel. O'Brien, C. J., after discussing the question, expressly declined to commit himself by an opinion, leaving it, as he said, "an open question" so far as he was concerned. Harrison, J., while basing his decision on the insufficiency of the statement of claim, says, in his opinion: "When the accident occurred, on the 12th June, the plaintiff was still unborn and had no existence apart from her mother, who was the only person whom the defendants contracted to carry on their line," etc. Johnson, J., in his opinion says: "As a matter of fact, when the act of negligence occurred, the plaintiff was not *in esse*, was not a person, or a passenger, or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action." Again, commenting on the claim of liability, the same learned judge says: "If it did not spring out of contract it must, I apprehend, have arisen, if at all, from the relative situation and circumstances of the defendant and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence, was not a human being and was not a passenger; in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise toward that which was not *in esse* in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of duty."

O'Brien, Associate J., in his opinion, says of the action: "It is admitted that such a thing was never heard of before; and yet the circumstances which would give rise to such a claim must at one time or another have existed." In *Dietrich v. Inhabitants, etc.*, *supra*, the court say: "But no

case, so far as we know, has ever decided that if the infant survived it could maintain an action for injuries received by it while in its mother's womb." Appellant's counsel substantially admits that there is no precedent for the action. While it is true that this is not conclusive that the action may not be maintained, yet, in view of the fact that, as said by Mr. Associate Justice O'Brien, similar circumstances must have before occurred, it is entitled to great weight, especially when the right to maintain the action is, to say the least, doubtful. Mr. Associate Justice O'Brien, in *Walker v. Great Northern Ry. Co.*, says: "The law is in some respects a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not decision." In this we fully concur. That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, can not, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.

If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie.

The judgment will be affirmed.

MR. JUSTICE WINDES dissenting.

I am unable to concur in the conclusion of the majority of the court in this case. What was said by the learned judges in deciding the cases of *Dietrich*, 138 Mass. 14, and *Walker*, 28 Law Rep. (Ireland), 69, in so far as those opin-

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ions may be applicable to the case at bar, was by way of argument, and, in my opinion, not necessary to the decision of the particular questions in those cases, and therefore not authority as precedents in the solution of the question here involved, except to the extent that the argument appeals to reason. In the Dietrich case the mother of the child was between four and five months advanced in pregnancy, and the child was too little advanced in foetal life to survive its premature birth, died before it was separated from its mother, and was not directly injured, unless by a communication of the shock to the mother, nor was there any contract between the mother and the defendant which in any way related to the child or for its benefit in any respect. The court might well have held that under all these facts an action could not be maintained, without deciding broadly, as it did, that no action would lie for injuries received by the child while in its mother's womb. The opinion seems based largely on the fact that no decided case had ever held that such an action would lie, and for the further reason that the child was a part of the mother at the time of the injury.

In the Walker case there was no notice to the defendant railway company that carried the mother as a passenger, of her condition, and the contract of carriage, out of which its duty, if any, to the child arose, was made without any reference to the unborn child. This case might well have been decided, as it was by the learned Chief Justice, solely on the ground that there were no facts set out in the statement of claim which fixed the defendant with liability for breach of duty as carriers of passengers. The railway company, having no notice of the condition of the mother, of the child's existence within her womb, it might well be said, so far as concerned the company, the child was a non-entity. Not so however, in the case at bar, where the mother contracted with the defendants with express reference to her condition, her confinement being imminent, and necessarily, in the nature of things, her contract was with reference to her unborn child and its care.

At the common law it is well settled that one is liable as for murder or manslaughter, according to the particular facts of each case, when he willfully and maliciously injures a child in its mother's womb, and death of the child results from such injuries, provided it be born alive. In the Walker case, *supra*, the learned Chief Justice quotes from Blackstone's Com., viz.: "In all cases the crime includes an injury; every public offense is also a private wrong and somewhat more; it affects the individual and also affects the public. * * * Upon the whole, we may observe, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz., not only to redress the party injured, by either restoring him to his right if possible, or by giving him an equivalent, but also to secure to the public the benefit of society by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole." Also from Stephen's Com., referring to the commission of crimes amounting to felony, viz.: "There still exists the remedy for the private wrong; even in cases of felony it is only suspended during the prosecution of the crime."

If the willful and malicious conduct of a person causing an injury to an unborn child resulting in its death, after it has been born alive, will fasten on that person the crime of murder or manslaughter, there seems to me no sound and logical reason, since the crime includes the injury to the child, and since the public offense is also a private and special wrong to the helpless infant, why, if the child should be so fortunate as to survive the injury, which, had it caused death after being born alive, would have made the wrong-doer a criminal before the law, the child should not have his action at law against this same wrong-doer for damages because of his tort.

It is the boast of the law that for every wrong it provides a remedy, but the law which says to the helpless infant, "If your injuries were inflicted, however wrongful, while you were sleeping peacefully in your mother's womb,

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though pulsating with life and vigor, or while you were moving forward to the outer world in obedience to nature's law, with a power almost irresistible, though just beyond the light of day, still a part of your mother, there is no remedy for your wrongs, if you live through them, though crippled or deformed for life, but if you can only die because of your injuries, the man who wronged you shall be indicted for murder and punished," gives but scant recompense, gives no practical redress, no adequate remedy to the wronged child. Such law is a reproach to civilization. It seems illogical to say the action can not be maintained because the child is a part of the mother. Long before it sees the light it is a living soul, pulsating with life, making its presence known by most vigorous action oftentimes, a distinct entity moving and having its being, though carried by the mother and attached to her by the umbilical cord. Why may it not be wronged? Why may it not suffer injuries? It can not be contended for a moment that the physician attending at the birth of a child would not be liable in damages to the child, if, after delivering it from its mother, but before he cut the connecting cord, he should willfully and maliciously wrench off both its arms. Could it be said that such an injury was to the mother, and that she must sue for and recover the damages to her child in such a case, because the doctor had not severed the umbilical cord—because the child was still a part of the mother? I think not. Could it be successfully contended that for an injury to Chang, one of the famous Siamese twins, he could not maintain an action because he was a part of his brother Eng—that he was not a separate entity? I think not. Could it be contended that in such case Eng was the person to bring the suit, because the injury to his brother Chang was an injury to him, Eng? I think it quite as reasonable to say that the mother can recover for injuries to her living, moving child, because contained in her womb or lying beside her after its birth, attached by the umbilical cord, as to say that in the case of an injury to one of the Siamese twins, the other could have brought suit. History informs us that one of these

twins survived the other several hours, and medical authorities give numerous instances of living children being delivered from their mothers after life was extinct. The child, when capable of being born alive, is, in my opinion, a distinct entity, under the common law, and although no decided civil case, so far as we know, has so held, humanity and enlightened civilization demand that the common law, as administered in Illinois in the nineteenth century, should so declare. I therefore think that though there is no precedent—no decided case like the one at bar—there is no good reason, as matter of law, why the action will not lie in behalf of this appellant.

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Charles D. F. Smith v. Augusta S. Billings et al., Executors of the Last Will of Albert M. Billings.

1. *WITNESS—Competency of Deposition After Death of Adverse Party.*—When the deposition of a party to a chancery proceeding has been taken in his own behalf, and pending the trial, the adverse party dies, his executors being substituted, etc., the deposition so far as it relates to transactions and conversations relating to the matter in controversy between such party and the deceased, which were had during his lifetime, is incompetent under the statute and is properly excluded.

In Chancery.—Bill to establish and enforce a trust. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Hearing and bill dismissed for want of equity; appeal by complainant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

STATEMENT.

The bill and amended bill in this case were exhibited by appellant against A. M. Billings as sole defendant, to establish and enforce a trust in favor of appellant in respect to certain stock which had been held by A. M. Billings, appellees' testator, and sold by him for the sum of \$60,960.

The testimony of appellant was taken in his own behalf by deposition. At the taking of the deposition counsel for A. M. Billings appeared before the notary public and cross-

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examined appellant. In his testimony thus taken appellant gave details of various transactions and conversations between himself and Billings, and identified certain letters written by Billings, all of which was presented as supporting the allegations of appellant's bill of complaint. On October 1, 1894, this deposition was filed in the court below, where the cause was pending. On February 2, 1897, the cause came on for final hearing. Appellant offered and read in evidence the said deposition. A deposition of one Rew was read and several witnesses were examined on behalf of appellant. Counsel for Billings called appellant to be sworn and examined by them by way of further cross-examination.

Upon February 5, 1897, and after counsel for appellant had announced that his case was closed, the hearing was adjourned to February 9, 1897. In the interim between these dates, and during the adjournment, the defendant, A. M. Billings, died. It appears from the bill of exceptions that on February 9, 1897, the cause was passed until the 16th of February, 1897. On the latter date the death of A. M. Billings, sole defendant, was suggested as having occurred on February 7, 1897, and an order was entered that complainant have summons against appellees as executors, etc. The appearance of appellees was entered upon the same day, viz., February 16, 1897. On February 18, 1897, the cause being apparently still upon hearing, a motion was presented by appellees to exclude the testimony of the complainant (appellant) as to transactions, conversations and communications between appellant and A. M. Billings, which were had in the lifetime of said Billings, in relation to the alleged trust. This motion was granted, and all such testimony of appellant was excluded. No proffer of any further testimony in support of his bill of complaint was made by appellant. Thereupon the court decreed that the bill of complaint be dismissed for want of equity.

WILLIAM P. BLACK, attorney for appellant, contended that "subsequent incompetency will not render inadmissible the deposition of a witness competent at the time it was taken."

Ency. of Pl. and Pr., Vol. 6, p. 572; citing Cameron v. Cameron, 15 Wis. 1; Keran v. Trice, 75 Va. 690; Smith v. Profit, 82 Va. 832; Sabine v. Strong, 6 Met. 270; Allen v. Russell, 78 Ky. 105.

“When a party deposes in his own behalf, his deposition is admissible after the death of the adverse party against the administrator or executor.” Ency. of Pl. & Pr., Vol. 6, p. 631, citing Sheidley v. Aultman, 18 Fed. Rep. 666; McMullen v. Ritchie, 64 Fed. Rep. 253; Vattier v. Hinde, 7 Pet. (U. S.) 252.

WINSTON & MEAGHER, attorneys for appellees; FREDERICK S. WINSTON, JAMES F. MEAGHER, SILAS H. STRAWN, of counsel.

No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall, as to transactions, communications and conversations with a deceased person, be allowed to testify in said action of his own motion or in his own behalf, when any adverse party sues or defends as the executor of such deceased person. S. & C. Rev. Stat. of Ill., Chap. 51, Sec. 2.

Nor in such case will the deposition of said party, even though taken in the lifetime of the party whose personal representatives now defend, be competent as against such personal representatives. S. & C. Rev. Stat. of Ill., Chap. 51, Sec. 2; Trunkey v. Hedstrom, 131 Ill. 204; Kelsey v. Snyder, 118 Ill. 544; Langley v. Dodsworth, 81 Ill. 86; Henry v. Tiffany, 5 Ill. App. 548; Quick v. Brooks, 29 Iowa, 484; Zane v. Fink, 18 W. Va. 693; Park v. Locke, 48 Ark. 133. 2 S. W. Rep. 696; Hewlett v. George, 68 Miss. 703, 9 S. Rep. 885; Barker v. Hebbard, 81 Mich. 267, 45 N. W. Rep. 964; 29 Am. & Eng. Enc. of Law, 690.

In Illinois the rule as to the competency of evidence is the same in chancery as in law. Kelsey v. Snyder, 118 Ill. 544; Phillips v. Love, 54 Ill. App. 526.

MR. JUSTICE SEARS delivered the opinion of the court.

The questions presented are, first, did the court err in

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excluding the testimony of appellant, and second, did the court err in dismissing the bill for want of equity.

If the appellant had proffered himself as a witness in his own behalf at the trial and after the death of the original defendant, Billings, and the substitution of appellees as defendants, no question could arise but that he must have been held incompetent under the provisions of Sec. 2, Chap. 51, Rev. Stat. It is, however, contended by counsel for appellant that because his testimony was taken by deposition during the lifetime of Billings, and because such deposition was offered and read in evidence upon the hearing and during the lifetime of Billings, that therefore the testimony so presented, having been competent when presented, should be held as competent to be considered by the court in weighing all the evidence of the case and disposing of the issues as against appellees, although they defend as executors of Billings.

There is a conflict in the decisions of other States as to the admissibility of evidence like this, taken by deposition before the death of a party litigant, and the substitution of personal representatives, under provisions of statutes somewhat similar to the one here in question.

The decisions cited as holding that such evidence is competent are *Comins v. Hetfield*, 80 N. Y. 261; *Matson v. Melchor*, 42 Mich. 477; *Smith, Ex'rs, v. Proffit's Adm'x*, 1 S. E. Rep. (Va.) 67; *LaFayette Mutual Bld. Ass'n v. Kleinhoffer*, 40 Mo. App. 388; *Marlatt v. Warwick*, 19 N. J. Eq. 444; *Pratt v. Patterson*, 81 Pa. St. 114; *Freyvogel v. Anderson*, 91 Id. 265; *Walbridge v. Knipper*, 96 Id. 48; *Neis v. Farquharsen*, 9 Wash. 508; *Sheidley v. Aultman*, 18 Fed. Rep. 666; *McMullin v. Ritchie*, 64 Fed. Rep. 253.

The reasoning of all these decisions is that the proper test is the competency of the witness at the very time when the testimony is taken, whether by deposition or examination in open court. They hold that if the witness be competent at the time he testifies, his competency can not be affected by the subsequent death of the adverse litigant. It would seem that this reasoning is based upon analogy to the

doctrine of the common law, that when a witness is made incompetent by reason of interest (under the common law rule making parties in interest incompetent), yet the testimony of such witness, taken before his interest existed, is competent. The common law rule incapacitating an interested witness is based upon his supposed bias. The only objection to the testimony of an interested witness being his supposed bias, the reason of a rule which declares his testimony competent if taken before such interest and hence before such bias came into existence, is apparent. But the analogy is doubtful. Here the purpose and motive of the statutory rule is to preserve equality of litigants in the admission of the testimony of interested parties. It is because, and solely because, one litigant has deceased and can not be heard to give his version of mutual transactions that the surviving litigant is also debarred from presenting his version. It is the use of the testimony and the time of its use which should govern if the spirit and purpose of the statute is to be regarded. We do not think that the common law rule as to competency of testimony of an interested witness, when such testimony is taken before interest accrued, should by analogy govern here. The testimony, being such at the time it is to be considered by the court as would, if admitted, contravene the spirit and purpose of the statute, in that it would be in effect permitting the living litigant to bring his version of mutual transactions to the consideration of the court at a time when the adverse litigant has been precluded by death from answering such version of the mutual transactions, should, we think, be treated as incompetent under the statute. Decisions of other States are not wanting which support this interpretation. *Quick v. Brooks*, 29 Iowa, 484; *Park v. Locke*, 2 S. W. Rep. (Ark.) 696; *Zane v. Fink*, 18 W. Va. 693; *St. Clair v. Orr*, 16 Ohio St. 220.

The reasoning of these decisions may be best shown by quotation from them. In *Quick v. Brooks*, *supra*, the court said, in construing a statute similar to ours: "Within the meaning of this statute, when did plaintiff testify? At

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the time his deposition was taken, or at the time of its use on the trial? We clearly think the latter. * * * The theory of the general statute, innovating, as it did, so thoroughly upon the rule of the common law, was, that the light should not be excluded because it might come from a possibly interested source, and hence, that those persons, the parties who were supposed to know more about a transaction in dispute than all others, should each be allowed to give their own version of the transaction, leaving the jury to judge of their credibility.

“But in perfect harmony with this general theory, and in the utmost accord with the reason of the law, it was deemed wise to provide that if one could not, by reason of death, give his version, neither shall the other. The want of opportunity to assist in the preparation of the cause by the decedent is not the sole ground for excluding the testimony of the survivor, nor by any means the principal ground. The prime reason is found in the inability of the party to oppose his statements, his testimony, to that of the surviving adversary. And this has been more than once announced as the reason of the law. *Watson v. Russell*, 18 Iowa, 80; *Bradley v. Kavanagh*, 12 Id. 273; *Romans v. Hays*, Id. 270; *Shafer v. Dean*, *ante*, 144.”

In *Park v. Locke*, *supra*, the court said: “In an action by or against an administrator, in which judgment may be rendered for or against him, the opposing party to the record is not a competent witness to speak of personal transactions with, or statements by, the deceased. This is the written law of the State as found in section 2, schedule constitution 1874. The reason for it, it is said, is found in this, viz.: that experience teaches that it is the part of prudence and wisdom to provide that when one of the parties to a transaction is cut off from giving his version of it by death, the other shall not be heard. (*McRea v. Holcomb*, 46 Ark., p. 306.) The appellant’s case is within both the letter and the reason of the law. He was a party to the record and offered to testify to statements made by a person who was at the time of the trial dead, and whose administrator was the opposing

party, and the testimony would have tended to augment the amount of the liability of the deceased's estate. The witness was competent, when the deposition was taken, because he deposed in the lifetime of his adversary; but in the meaning of the provision quoted above, he testified, or offered to testify by the use of the deposition, at the trial. He was then incompetent to detail statements made by the deceased."

In *Zana v. Fink*, *supra*, the court said: "If the deposition of a party is so taken and filed, whether taken and filed in the lifetime of the testator or not, as to any communication or transaction had by him personally with a decedent, such testimony is not competent to be used, or to be read against a defendant who is administrator of such decedent in a case at law, or in chancery. * * * I think that the want of opportunity to assist in the preparation of a cause by the decedent is not the sole ground for excluding the testimony of a party in his own behalf as to any communications or transactions had personally by such party with a decedent, as against a defendant who is administrator of such decedent. * * * The principal reason is found in the inability of the decedent, by reason of death, to oppose his statements—his testimony—to the adversary whose deposition has been taken in his own behalf, or whose testimony is so offered, in relation to such personal communications or transactions."

It is apparent that these decisions make the conditions existing at the time of the use of the testimony, and not such as exist at the time of the taking of it, govern its admissibility.

The Supreme Court of this State has not had occasion to construe this statute as applied to facts precisely similar to the facts here; but that court has announced in a number of decisions its interpretation of the spirit and purpose of the statute, and has repeatedly defined it to be the intent of the act to preserve the equality of litigants, while removing the common law disability of interested witnesses. *Boyn-ton v. Phelps*, 52 Ill. 210; *Merrill v. Atkin*, 59 Id. 19; *Alexander v. Hoffman*, 70 Id. 114; *Whitmer v. Rucker*, 71 Id.

410; Langley v. Dodsworth, 81 Id. 86. Hurlbut v. Meeker, 104 Id. 541; Plain v. Roth, 107 Id. 588; Ferbrache v. Ferbrache, 110 Id. 210; Kelsey v. Snyder, 118 Id. 544; Trunkey v. Hedstrom, 131 Id. 204; Butz v. Schwartz, 135 Id. 180; Henry v. Tiffany, 5 Ill. App. 548; Redden v. Inman, 6 Id. 55; Berdan v. Allan, 10 Id. 91.

In Whitmer v. Rucker, *supra*, the court said: "These explain and make the purpose of the statute manifest, and show, beyond all doubt, that it was not intended that one party to the suit should be a witness, when from death, etc., * * * the other party can not be heard to testify, etc. * * * This, like the other remedial statutes, has a spirit that extends beyond the mere letter, and it is the duty of the courts to so construe such statutes as to effectuate the objects of the law-makers, as gathered from the enactment."

In Butz v. Schwartz, *supra*, the court adopt and quote from the opinion of Mr. Justice Wall, as follows: "The object of the second section of the act referred to was to so limit the operation of the first section as to place parties upon an equal footing, and not to allow the estate of a deceased person, etc., * * * to be subjected to a disadvantage not possible if it were not for such death, etc.; and the courts have always endeavored to construe the statute according to its spirit, and not merely according to its letter."

In Berdan v. Allan, *supra*, this court, in approving the action of the trial court in excluding evidence as within the application of this statute, said: "The action of the court was clearly within the spirit of the statute, if not so clearly within its letter, and we think is fully sustained by the decisions of our own courts."

In Trunkey v. Hedstrom, *supra*, the facts were in some respects similar to the facts here. There, as here, it was sought to introduce evidence of a witness, made incompetent by the death of another, and the evidence had been taken in a former trial and prior to the death, which made the witness incompetent. In that case the evidence of the deceased

was also preserved and proffered, together with the evidence of the living interested witness. The court said: "That Trunkey would have been an incompetent witness at common law, must be conceded. That incompetency is removed by our statute, with certain exceptions, among which is the one above quoted. While the policy of this statute is to allow all persons to testify in civil suits, regardless of their interest in the event thereof, there is a studied purpose manifested in its various sections to put the parties upon an equality as to the evidence of such interested witnesses. (Langley v. Dodsworth, Ex'rs, 81 Ill. 86.) Whether Trunkey was allowed to testify on this trial or his former evidence was read to the jury, could make no difference. In either case the equality between the parties would be destroyed, Pratt being dead. The rule cited from Greenleaf has no application to the question here presented. The fact that in this particular case the testimony of the deceased agent was available to the defendants, can not change the rule prescribed by the statute. It was necessary for plaintiffs to make out their case, in the first instance, by competent proof. Until they had done so, the defendants were not called upon to introduce any evidence. Plaintiffs could not avail themselves of proof made incompetent by the statute, simply because defendants had in their possession testimony which would tend to overcome such incompetent evidence. The offered testimony was incompetent and properly excluded."

It is apparent from these decisions that our courts have not adopted the test applied by the courts whose decisions are cited by appellant, viz., the competency of the witness at the time of the taking of his testimony; but have always held to such application of the statute as would accord with its spirit and purpose.

To admit the testimony of the appellant as the basis of a recovery against appellees, who are defending as executors, would be, we think, clearly in contravention of the spirit of the statute. Nor do we view the fact that the deposition had been read before the death of Billings as changing the

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rule. It is the use of the testimony in determining the issues upon the trial which the statutes preclude, and although the reading of the testimony to the court had been concluded before the death of Billings, yet appellant asked that the court consider, weigh and act upon this testimony after the death of Billings, and as against appellees, defending as his executors.

The statute which makes a bill of revivor unnecessary, provides in terms that after suggestion of death of a sole defendant, summons may be had against the legal representative, after which the suit "may proceed as if it had been originally commenced against him." Chap. 1, Sec. 11, Rev. Stat.

If this suit had been originally commenced against appellees, the testimony in question would have been incompetent. We are of opinion that the court did not err in excluding it.

After the exclusion of the testimony of the appellant there remained no evidence sufficient to sustain the allegations of the bill of complaint. No proffer of further evidence was made, and no request for further opportunity to procure evidence. Counsel for appellant complains that a certain stipulation was not put in evidence by appellees. But the additional record filed here discloses that counsel for appellees and the court acceded to the request of appellant that the stipulation might be included in the certificate of evidence. That it was not included in the certificate of evidence, as prepared and presented by appellant, can not now be complained of. Upon all the evidence remaining in the case after the exclusion of the testimony of appellant, we think the court was fully warranted in dismissing the bill for want of equity.

The decree is affirmed.

Mr. Presiding Justice Adams took no part in this decision.

Mary Schafer v. Niels Buck.

1. JUDGMENTS—*Power of the Circuit Court over Transcripts Filed.*—The filing of a transcript of a justice's judgment in the office of the clerk of the Circuit Court, makes the judgment a lien upon real estate, and it will so remain pending an appeal of the case from the justice.

2. SAME—*Power of the Court over the Lien, Pending an Appeal.*—The court to which the appeal is taken from the justice has no power to substitute the bond and money of the party appealing, deposited with the clerk of the court, so as to release or affect the lien.

Order of the Circuit Court, striking a transcript of a justice's judgment from the files; the Hon. FRANK BAKER, Judge, presiding. Appeal by the party filing the transcript. Heard in this court at the March term, 1898. Reversed. Opinion filed May 26, 1898.

BISHOP & LOCKWOOD, attorneys for appellant.

A. A. ROLF and F. L. SALISBURY, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant recovered a judgment against appellee before a justice of the peace, on which, upon oath, immediate execution was issued to a constable, who, four days after the rendition of the judgment, returned it with the following indorsement of his return thereon, viz.:

"The within named defendant, Niels Buck, has no personal property in my county whereof I can cause to be made the judgment and costs within mentioned, or any part thereof, according to the command of the within writ, and I therefore return the same, no part satisfied, this 20th day of April, A. D. 1897.

JAMES LARNEY, Constable."

Afterward, on April 22, 1897, a transcript of the proceedings before the justice, judgment, execution and return thereon, as provided by the statute (Rev. Stat. S. & C., Ch. 79, Sec. 135), was filed with the clerk of the Circuit Court of Cook County, and duly recorded by him, as required by statute, in the transcript record of the Circuit Court.

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April 26, 1897, appellee, Buck, perfected his appeal from the judgment rendered against him by the justice, by filing his appeal bond in said Circuit Court on that day, which was approved by the clerk, and a supersedeas issued from the Circuit Court to the justice of the peace.

In the matter of the proceeding by appellant in filing the transcript, etc., April 22, 1897, on motion of appellee, supported by his affidavit, on July 23, 1897, the court ordered that upon appellee depositing with the clerk of the Circuit Court the sum of \$200, said transcript of judgment should be stricken from the files and the record thereof stricken from the judgment docket of the Circuit Court, and providing that the \$200 to be deposited should be for the payment of any judgment and costs that might be rendered against appellee in the case of the appeal of appellee from the judgment rendered by the justice against him then pending and undisposed of in the Circuit Court, subject, however, to the further order of the court.

Pursuant to said order appellee deposited with the clerk the sum of \$200, and the court ordered that said transcript be stricken from the files of the Circuit Court, and the record thereof stricken from the judgment docket, and that "the lien created by the filing of said transcript of judgment is hereby set aside and vacated."

From this order appellant has appealed and contends that the Circuit Court had no jurisdiction to entertain appellee's motion nor to enter said order, and also that if the court had jurisdiction, still the entry of the order was error.

The statute above referred to provides that when a transcript shall be filed in the Circuit Court, "the judgment shall thenceforward have all the effect of a judgment of the said court, and execution shall issue thereon, out of that court, as in other cases."

In *Seymour v. Haines*, 104 Ill. 561, it was held that by filing a transcript under this statute, the original judgment before the justice did not become a judgment of the Circuit Court—that "it is still merely the judgment rendered by

the justice of the peace. The proceeding is purely statutory, and for the purpose of obtaining satisfaction of the judgment remaining on the justice's docket. * * * The filing of the transcript and suing out an execution from the clerk's office is but a mode of obtaining satisfaction, by rendering defendant's real estate liable to sale in the same manner as on judgments recovered in the Circuit Court. * * * The judgment remains the same, but an additional means of having execution is given by the statute. It becomes a lien on real estate. It becomes a record. Execution may be issued upon it by the clerk, and it may be satisfied in the same manner as a judgment of the Circuit Court."

In case of a bill filed by a judgment debtor, under facts similar to the case at bar, praying that the record of a justice's transcript and the supposed lien thereby created might be set aside and be held to have no force or effect as against the debtor or his property, and that the judgment in the transcript named, be canceled and held for naught, this court held, in 50 Ill. App. 286, Mr. Justice Shepard delivering the opinion of the court, that by the filing of the appeal bond and the issuance and service of the writ of supersedeas, all proceedings under the judgment were suspended, but the judgment was not thereby vacated or annulled, nor the lien created by the transcript abrogated nor in any way interfered with; that the execution of the lien was stayed, but the lien itself was not destroyed; that it "remained as effectual in every respect, except as to proceedings to enforce it, as it was before the bond was filed and the appeal perfected. The appeal operated to stay proceedings merely, and not to vacate anything that had been done before;" and reversed a decree of the chancellor rendered in accordance with the prayer of the bill and directed that the bill be dismissed.

Under a similar statute in Pennsylvania it has been held that the court had no power to set aside the lien created by such a transcript of judgment pending an appeal from the justice judgment. *Dailey v. Gifford*, 12 Serg. & R. (Pa.) 72; *Engard v. O'Brien*, 9 Phil. 559.

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The cases from Pennsylvania to the contrary, cited by appellee, were decided under a later statute, which provides, in effect, that the transcript of the justice judgment, when filed in the Court of Common Pleas, should "be and have all the force and effect" of a judgment of that court. *Campbell v. Enler*, 1 Phil. Co. Ct. Rep. 394.

The only provision of our statute (Ch. 79, Sec. 115) as to the effect of an appeal from a judgment of a justice of the peace when the bond is filed with the clerk of the court to which the appeal is taken, is that upon the supersedeas being served upon "the justice who gave the judgment and the constable in whose hands an execution or other process may be in relation thereto, they shall suspend all further proceedings thereon." We are therefore of opinion that the statute with regard to real estate transcripts, under the facts shown in this record, gave appellant a lien on any real estate of appellee, in Cook county, which was in no way affected by the appeal of appellee, except that all proceedings to enforce such lien were suspended, and that the Circuit Court had no power, upon the deposit by appellee of \$200 with its clerk for the payment of any judgment and costs which might be rendered against appellee on the trial of the appeal case, to strike the justice transcript from the files, nor to set aside and vacate the lien of appellant thereby created.

The right is given and must be controlled by the statute, and however great may be the hardship upon appellee of the judgment remaining a lien upon his real estate pending his appeal, the statute has also declared what shall be the effect of such appeal, and has made no provision by which the Circuit Court is empowered to substitute his bond and money deposited with the clerk for appellant's lien. The court being without the power, we can not consider the matter of hardship to appellee, nor the fact that the order would appear to be just or equitable, and to fully protect any rights of appellants. Such considerations are for the legislature, not the courts of law.

Various objections are made by counsel for appellee as to

the sufficiency of the transcript under the statute to create a lien, and therefore justifying the order of the Circuit Court, but we regard these matters as immaterial, since the court was without power to pass upon the sufficiency of appellant's lien in that proceeding. However, if it be conceded the court had power to pass upon the sufficiency of the transcript, we are of opinion that the transcript is sufficient, and in compliance with the statute. The order of the Circuit Court is therefore reversed.

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**The Illinois Conference of the Evangelical Association
v. Henry F. Plagge, Adm'r.**

1. **BILL OF EXCEPTIONS—*Time for Filing.***—Where the court extends the time for filing a bill of exceptions to a specified date, after the expiration of the term, and no bill is presented within the time specified, the court has no power after the expiration of the time to sign the bill or to again extend the time for settling and signing it.

Assumpsit, on five promissory notes. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. On motion, bill of exceptions stricken from the files and judgment affirmed. Opinion filed May 26, 1898.

RITCHIE, ESHER & WOOLLEY, attorneys for appellant.

KNECHT, BULLARD & ROBLIN, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The record shows that the judgment in this case was entered in the Circuit Court on July 17, 1897. An appeal was then prayed, and the time for filing a bill of exceptions was extended to September 10, 1897. No bill of exceptions was signed within the time limited, nor was any further order entered extending time for same until after September 10, 1897.

The proceedings subsequent to September 10, 1897, are set forth in the abstract of record as follows:

“September 14, 1897. Motion by defendant that bill of exceptions be signed and filed as of September 9, 1897, or time extended within which same may be signed and filed, to September 18, 1897. Said motion being supported by affidavit.

“Said motion having been partially heard, upon motion of counsel for plaintiff, it is ordered that the further hearing of said motion be postponed till September 15, 1897.

“Order September 15, 1897. This day came again the said parties, and counsel having been heard, and the court being fully advised in the premises, it is by the court ordered that the time for filing the bill of exceptions in this case by the defendant be, and the same hereby is, extended to and including the 18th day of September, 1897.

“September 17, 1897, bill of exceptions filed.”

Appellee moves that this bill of exceptions be stricken from the record. We are of opinion that the motion must be allowed.

The court having extended the time for filing a bill of exceptions to a specified date, which was after the judgment term, and no bill having been presented to the judge within the time specified, the court then had no power after the expiration of the time fixed, either to sign a bill of exceptions or to extend the time for the settling and signing of the same. *Hake v. Strubel*, 121 Ill. 321; *Village of Marseilles v. Howland*, 136 Id. 81; *Pardridge v. Morganthau*, 157 Id. 395.

The decision in *Conductors' Benefit Ass'n v. Leonard*, 166 Ill. 158, does not overrule or conflict with these decisions. It was there held that in a suit in chancery a certificate of evidence, which had been presented to the chancellor and signed within the time allowed, might be filed at any time during the same term, although after the expiration of the time allowed.

In the case under consideration nothing was done in the matter of settling a bill of exceptions, none was signed by

the judge, none was presented to him for signature, until after the expiration of the time fixed. At the expiration of the time fixed, which was after the judgment term, no order of extension having been entered, the court had lost jurisdiction, and the order of September 15, 1897, was without effect. The bill of exceptions is therefore ordered stricken from the record. It follows that upon this appeal the judgment of the Circuit Court must be affirmed.

Diamond Joe Line v. James R. Carter et al.

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1. **PRACTICE**—*A General Finding—When Sufficient.*—A general finding is sufficient if either count of the declaration is good.

2. **WAREHOUSEMAN**—*Liability for a Wrongful Delivery.*—A warehouseman is liable for a wrongful delivery of the goods committed to his keeping.

Trover.—Misdelivery of goods by a warehouseman. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Finding and judgment for plaintiff, \$250. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

STATEMENT OF FACTS.

This was an action commenced to recover damages for the loss occasioned by the misdelivery of a portion of a shipment of ink from Chicago to St. Paul, Minnesota, over the Illinois Central Railroad by way of appellant's steamboat line operated on the Mississippi river.

The entire shipment contained 1,000 boxes of ink. Upon the bill of lading the following indorsement was written:

"Deliver to C. S. Eaton or to Fred. H. Jackson, as per our telegraphic or written instructions.

July 6, 1891.

CARTER, DINSMORE & Co."

The bill of lading was sent by the consignor to R. J. Williams, agent of the Illinois Central Railroad at St. Paul, Minnesota, with the following instructions:

Diamond Joe Line v. Carter.

"DEAR SIR: Please find enclosed B-L for 1,000 bxs. ink, to be delivered from time to time to C. S. Eaton and F. H. Jackson in accordance with our telegraphic or written instructions."

After the ink had arrived at St. Paul and after the same had been placed in the appellant's warehouse, appellees directed said Williams by telegraph to release a part of said shipment of ink to Eaton & Jackson. Thereupon Williams transmitted a copy of such order or orders from appellees to C. R. Brockway, the agent of appellant at St. Paul, Minnesota, and in this way 600 of the 1,000 boxes of ink were delivered to Eaton & Jackson. On the 14th day of July, 1891, appellees directed Williams by telegram to release the balance of said ink, as follows:

"R. J. WILLIAMS, Freight Agent Illinois Central R. R., St. Paul, Minn.:

Release hundred boxes to Chas. S. Eaton and hundred to Fred. H. Jackson; forward two hundred consigned to us to place designated by them.

CARTER, DINSMORE & Co."

On the same day Williams transmitted a copy of the above telegraphic order to C. R. Brockway, requesting him to comply with the order. Thereupon Brockway delivered the remaining 400 boxes of ink to Eaton & Jackson.

On July 31, 1891, appellees wrote to R. J. Williams, agent, etc., as follows:

"DEAR SIR: On July 14 we telegraphed you to release 100 boxes ink from our consignment of 1,000 boxes June 17, to Chas. S. Eaton and 100 boxes to F. H. Jackson, and we asked you further to reship 200 boxes to places designated by them, consigning the goods to us. We have not received bills of lading from these shipments, and should be glad to learn from you what was done in the premises."

Also a letter from same parties to same party, bearing date August 15, 1891, viz.:

"BOSTON, Aug. 15, 1891.

MR. ROBERT J. WILLIAMS, 169 East 3d St., St. Paul, Minn.

DEAR SIR: We are surprised to learn from your letter

of Aug. 12, how our instructions of July 14 were carried out. We beg leave to quote our telegram on that date as follows:

'Release 100 boxes to Chas. S. Eaton and 100 boxes to Fred. H. Jackson. Forward 200 consigned to us to places designated by them.' It seems to be perfectly plain from this telegram that we yielded the title to only 200 boxes of ink, the phrase 'consigned to us' expressing our purpose very clearly. We believe that Messrs. Eaton & Jackson are responsible parties and hope that no serious trouble will arise over your mistake; but should any difficulty occur in the premises, we shall, of course, insist upon our title to the shipment, excepting so far as we have expressly yielded that title, and shall hold the proper parties responsible for any losses.

Yours truly,

CARTER, DINSMORE & Co."

Also a letter to Brockway, dated Aug. 15, 1891, viz.:

"BOSTON, Aug. 15, 1891.

MR. C. R. BROCKWAY, Diamond Joe Line, St. Paul, Minn.

DEAR SIR: We are advised by Mr. R. J. Williams, of the Ill. Cr. R. Co., that he gave you a copy of our telegram of July 14, which read as follows: 'Release 100 boxes to Chas. S. Eaton and 100 boxes to Fred. H. Jackson. Forward 200 consigned to us to places designated by them.' It would appear from Mr. Williams' letter that you not only delivered the 200 boxes which we ordered to be released to them, but also the 200 additional boxes, the title to which we expressly reserved, in the phrase 'consigned to ourselves.' We believe that Messrs. Eaton & Jackson are responsible parties, and hope that no serious difficulty will arise in the premises. We have never released our title to the 200 boxes, however, and, of course, we shall look to the proper parties for indemnification in case of any difficulty in the matter of collection.

Yours truly,

CARTER, DINSMORE & Co."

The declaration consists of two counts. The first count

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charges liability against appellant as a common carrier. The second count is in trover, charging appellant with the conversion of 200 boxes of ink.

A plea of the general issue was filed, and the cause was tried before the court without a jury.

Judgment was rendered against appellant for \$250, from which this appeal is taken.

G. W. & J. T. KRETZINGER, attorneys for appellant.

L. M. GREELEY, attorney for appellees.

Appellees were entitled to recover for the wrongful delivery of the goods by appellant upon the count in trover. *Indianapolis & St. Louis R. R. v. Herndon*, 81 Ill. 143.

It matters not whether the wrongful delivery was made by appellant in the character of common carrier, or whether such wrongful delivery was made by it in the character of warehouseman. *Indianapolis & St. Louis R. R. Co. v. Herndon*, 81 Ill. 143; *Peoria, etc., R. R. Co. v. Buckley*, 114 Ill. 337.

In the case of a wrongful delivery, trover lies without the necessity of a demand previous to the bringing of the action. *Ill. Cent. R. R. Co. v. Parks*, 54 Ill. 294; *Howitt v. Estelle*, 92 Ill. 218; *Bane v. Detrick*, 52 Ill. 19; *Hayes v. Mass. Life Ins. Co.*, 125 Ill. 626-637.

MR. JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

A question is made by appellant to the effect that the court found that the plaintiff was entitled to recover under the first count, and not under the second count, and inasmuch as it is claimed there was a fatal variance between the proof and the first count, that the judgment must be reversed because of such variance. This contention as to the finding of the court would seem, from the abstract, to be correct, but by the record in the bill of exceptions and the judgment of the court, it appears that the court held that the plaintiff was entitled to recover, and the finding

of the court in its order of judgment is, "finds the defendant guilty and assesses the plaintiff's damages at the sum of \$250." This we regard as a finding generally, and is sufficient if either count is good.

We do not understand that it is claimed by appellant, but that appellees were entitled to recover under the count in trover, if entitled to recover at all under the evidence; and if it did so contend, we are of opinion such contention is not tenable. The count in trover is good. *R. R. Co. v. Herndon*, 81 Ill. 143; *R. R. Co. v. Buckley*, 114 Id. 337.

We are inclined to the view that appellant's liability was as a warehouseman and not as a common carrier, the goods having been safely carried and stored in appellant's warehouse in St. Paul, unless it was made liable as a carrier (by a failure to obey the order to its agent,) Brockway, to forward the 200 boxes of ink in question consigned to appellees to places designated by Eaton & Jackson. (*Gregg v. R. R. Co.*, 147 Ill. 555, and cases cited.) Waiving that question, however, we think they were liable as warehousemen. It was appellant's plain duty under the order given to its agent, if it undertook to act under the order, to forward the goods to places to be designated by Eaton & Jackson to appellees as consignees, and in delivering them to Eaton & Jackson, there was negligence—a wrongful delivery, for which it is liable. It failed to exercise ordinary or reasonable care as to the goods, as was its duty as warehouseman. *Herndon case, supra*; *Buckley case, supra*; *Gregg case, supra*.

We think the contention of appellant that Brockway was the agent of appellees, and not of appellant, is not tenable, and what was said by the Supreme Court in *I. C. R. R. Co. v. Carter*, 165 Ill. 572, as to the agency of Williams, was said with reference to the liability of the railway company as a carrier and insurer and after its duty had been fully performed by delivering the goods to appellant. Appellant assumed the liability of warehouseman of these goods, and it continued until the goods were delivered to the persons entitled to receive them. They failed to perform their duty to exer-

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cise ordinary and reasonable care to deliver them as their agent was directed.

Appellees have assigned as cross-error that the court refused to hold a proposition of law to the effect that they were entitled to recover interest. Conceding appellees' right to recover interest from the date of wrongful delivery to the date of the judgment, the proposition of law which the court was asked to hold was that appellees were entitled to interest from August 7, 1891, the date of Brookway's letter to Carter, Dinsmore & Co., while the evidence fails to show there was a delivery prior to August 12, 1891, and the letter referred to is dated August 17, 1891. The court did not err in refusing the proposition as asked. The judgment is affirmed.

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George F. Harding v. Andrew Olson.

1. **CONTRACTS—*Must be Mutual.***—A contract between parties *sui juris* must be mutual. If either party is bound both will be bound.

2. **SAME—*Rights of Party Filing a Bill to Rescind.***—If a party entitled to rescind a contract, files a bill for that purpose, his right to avoid the contract is fixed and can not be affected or defeated by any action of the other party thereafter.

3. **TENDER—*Under Agreement for a Warranty Deed.***—The tender of a deed of conveyance after the filing of a bill to rescind a contract for the sale of real estate is too late and can not operate as a revival of the contract or affect the vendee's rights in the premises.

4. **SAME—*Of an Unrecorded Contract.***—In a suit to rescind a contract for the sale of real estate, if the contract has not been recorded, a tender of it to the defendant before bringing the suit is unnecessary.

5. **EQUITY PRACTICE—*Objection that There is a Remedy at Law.***—If a defendant submits to the jurisdiction of the court and answers the bill it is too late for him to object that the complainant has an adequate remedy at law. Such an objection must be made at the earliest opportunity.

6. **SAME—*Cross-Bill—How Regarded.***—As between the parties to a suit in chancery a cross-bill is to be regarded as an adjunct—or part of the original suit—and the whole together as constituting but one case.

7. **PARTIES—*In Chancery.***—When a person is a mere naked, legal trustee, and has no substantial or beneficial interest in the premises, and no relief is sought against him, such person is not a necessary party to a proceeding in chancery to rescind a contract for the sale of real estate.

Bill to Cancel a Contract.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

WM. J. AMMEN, attorney for appellant.

JOS. D. HUBBARD, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a decree in favor of appellee and against appellant, on a bill filed December 3, 1895, praying the cancellation of a contract for the sale by appellant to appellee of certain premises and a return from appellant to appellee of the amount of the money paid in pursuance of the contract.

The bill alleges, in substance, that January 3, 1890, a contract in writing was executed by the parties for the sale by appellant to appellee of lots 5 and 6 in block 2, in Junction Grove subdivision of the south 27 acres of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 22, township 35 north, range 14 east of the third principal meridian, in Cook county, Illinois, for \$1,000; that appellee paid \$125 at the date of the contract, \$75 February 24, 1890, and, by the contract, appellee agreed to pay the remainder, \$800, on or before January 3, 1896, in such sums and at such times as he might elect, with interest at the rate of six per cent per annum, payable semi-annually, and that if appellee failed to pay such remainder on or before January 3, 1896, appellant might, at his option, declare the contract forfeited and retain, as liquidated damages, all payments made; that it was further agreed that, after two years from date of the contract, and the payment in full of principal and interest, appellee should be entitled to a warranty deed of said premises free and clear of all incumbrances; that on October 1, 1895, appellee had paid to appellant all that was due on the contract, except the sum of \$383.58, and that appellee also, in pursuance of the contract, paid taxes and assessments on the premises to the amount of \$190.78.

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It is further alleged in the bill, that August 2, 1895, appellee, by his attorney, notified appellant that he, appellee, was ready to pay appellant \$376.74, the balance then due on the contract, and requested appellant to execute to him a conveyance of the premises described in the contract as therein provided, and offered to allow appellant a reasonable time in which to clear the title; that appellee caused the title to be examined, and it was discovered that, at the time of the execution of the contract, appellant had no title to the premises, although appellee believes that he was the equitable owner thereof, the naked legal title being in George F. Harding, Jr., who held such title as trustee for appellant; that July 16, 1890, George F. Harding, Jr., conveyed the premises in fee simple to the Firemen's Insurance Company, which company is the owner of same; that George F. Harding represented himself to be the owner, and appellee, relying on said representation, and believing that appellant would convey the premises to him on payment and demand, omitted to file the contract for record, but appellee avers, believes and charges that the Firemen's Insurance Company took title to the premises with full knowledge of appellee's contract and his rights thereunder. The bill then alleges that judgments have been rendered against the Firemen's Insurance Company in favor of the following named persons, and for the amounts, at the dates, and by the courts mentioned:

Augusta Barnsch, December 22, 1894, Circuit Court, Cook County, \$1,665.

Appleton Paper and Pulp Company, February 16, 1893, Circuit Court, \$2,182.50.

Appleton Paper and Pulp Company, July 5, 1895, Appellate Court, First District; on appeal from judgment in last mentioned case, judgment affirmed, and that said judgments are liens on said premises.

That, October 21, 1895, appellee tendered to both appellant and the Firemen's Insurance Company the sum of \$383.58, being the balance then due on the contract, notified them that said judgments were liens on the premises, de-

manded that the judgments should be satisfied or the premises released therefrom, demanded a warranty deed of the premises, and offered to allow appellant and the insurance company five days in which to procure a good title, all of which they have failed and refused to do.

The bill, after alleging a fear that appellant may declare a forfeiture of the contract, makes appellant and the Firemen's Insurance Company defendants, prays for an accounting as to moneys paid by appellee, a cancellation and delivery up of the contract, and a decree that appellant repay to appellee all sums paid by him on account of the contract.

Appellant and the Firemen's Insurance Company filed a joint and several answer to the bill January 4, 1896. The answer admits the contract as alleged in the bill, and that October 21, 1895, appellee had paid appellant Harding all of the consideration for the contract, except in the neighborhood of \$383.58; also that, some time in August, 1895, appellee stated to appellant, Harding, that he was ready to pay the balance due, and desired said Harding to execute and deliver to him a conveyance of the premises free and clear of all incumbrances; also that, at the date of the contract, the title to the premises was in George F. Harding, Jr., but that he held merely the naked legal title, and appellant was the real and equitable owner. The answer also admits that the judgments mentioned in the bill are apparent liens on the premises in question.

The answer disclaims knowledge of the amount paid by appellee for taxes and assessments and also of the amount due on the contract in August, 1895, when appellee notified appellant, Harding, that he was ready to pay the balance due on the contract, and demanded a deed.

The answer avers that, December 21, 1892, the Firemen's Insurance Company conveyed the premises in fee simple to the Chicago Real Estate Loan and Trust Company by a deed which has been lost or mislaid, and was never recorded, but that each of said companies took the title on condition that whenever appellee should comply fully with his contract, it would convey the premises to

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him or to appellant, Harding, so that he could convey to appellee; that appellant is the president of both said companies. The answer further avers that all of the suits mentioned in the bill are pending in the Supreme Court on appeal from the Appellate Court; that they were appealed to the October term, 1896, of the former court; that decisions are shortly expected; that if the judgments should be affirmed, they would be promptly paid, etc., and that appellant was unable to comply with the contract until said suits should be finally determined. The answer further avers that the Chicago Real Estate Loan and Trust Company has filed a bill in the Circuit Court of Cook County to have the apparent lien of said judgments removed, and that the defendants to appellee's bill expected to obtain a decree removing such liens within the next ten days. The answer denies any intention on the part of appellant, Harding, to declare the contract forfeited.

On January 14, 1897, after the master's report was filed, it was stipulated between the parties that appellee might file *instantly* an amended bill, and that the defendants might, within four days from that date, file an answer to the amended bill, and also an amended cross-bill, and that a demurrer to the cross-bill theretofore filed should stand as a demurrer to the amended cross-bill.

In pursuance to this stipulation, appellee, January 14, 1897, filed an amended bill, which it is unnecessary to refer to, as, in our opinion, the amendments did not materially change the aspect of the case.

The appellant and the Firemen's Insurance Company filed an amended cross-bill January 18, 1897, but filed no answer to the amended bill, nor is it prayed in the amended cross-bill that it may be taken or considered as an answer to the amended bill. The master, in his report, filed January 11, 1897, found that appellee had paid of the purchase price of the premises, and for taxes and special assessments which, by the contract, he was required to pay, divers sums at divers times, which, with interest thereon, amounted to \$1,278.57, and that appellee was entitled to a decree as prayed by his bill.

Exceptions were filed to the report by appellant and the Firemen's Insurance Company, which the court overruled and rendered a decree in accordance with the bill, and at the same time sustained the demurrer to the amended cross-bill, and, appellant electing to abide by the cross-bill, dismissed the cross-bill. The foregoing analysis of the bill and answer show that all the material allegations of the bill were admitted by the answer except the amount paid by appellee for taxes and assessments, which amount was fully proved before the master.

Appellant's counsel says, in his argument, "the contract in this case did not make time of performance of Mr. Harding, of the essence of the contract; it was only time of payment on the part of Olson that was made of the essence of the contract." If it is intended by this statement to convey the idea that, while appellant might insist on strict performance by appellee, in accordance with the letter of the contract, appellee had no right on fully performing or tendering performance of his part of the contract, to demand a deed, we think the proposition clearly untenable. The contract was mutual and expressly provides, "It is understood that after two years from the date hereof, and upon payment in full of principal and interest, said second party shall be entitled to a deed."

"It is a rule of general application in the law of contracts, that a contract between parties *sui juris* must be mutual—that is, if either is bound both will be bound." Weaver et al. v. Weaver, 109 Ill. 225, 232; Vogel v. Pekoc, 157 Ib. 339, 342.

It is further contended that appellee had no right to refuse to accept the title on account of the judgments against the insurance company; that the company took the title with notice of the contract, and was bound to convey; that appellant and the company were ready to convey; and that the judgments were not real, but only apparent liens, etc.

Appellant, in his answer to appellee's bill, after referring to the judgments in question, and the appeals from them,

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says that he "is utterly unable to comply with said contract until said suits shall have been fully determined in the Supreme Court," etc., thus treating the judgments as liens necessary to be removed before he could comply with his contract, and it further appears from the answer and the evidence, that the Chicago Real Estate Loan and Trust Company, whose president appellant was, and which company appears to have acted merely as his agent and trustee, had filed a bill in the Circuit Court, by appellant's direction, not only for the removal of the apparent liens of the judgments in question from the premises in question, but from other premises owned by that company.

In appellant's testimony he says: "I have also caused to be filed a bill against judgment creditors to remove the incumbrance on the title." Again, "we told Mr. Hubbard and Mr. Olson—Mr. Olson more than once—we were ready to make the conveyance of the title and wanted a little delay so as to be sure to get these liens out of the way."

We think there can be no question that the judgments constituted liens apparent of record which, while they remained, decreased the market value of the property and rendered it less salable, and that appellee was not bound to accept a conveyance of the premises during the existence of such liens.

It is not alleged in the answer, and it does not appear from the evidence, that any deed or conveyance was tendered to appellee until December 11, 1896, more than eleven months after the contract had expired by limitation, and while evidence was being taken before the master, when appellant's counsel tendered two warranty deeds of the premises, one from appellant and wife and one from the Chicago Real Estate Loan and Trust Company. This tender was too late. The filing of the bill by appellee was a rescission of the contract, and appellant's offer of the deed of conveyance could not operate to revive the contract, or affect appellee's rights in the premises. *Thomas v. Coultas*, 76 Ill. 493, 498.

It is assigned as error, and appears to be relied on in

appellant's argument, that the court found that all money paid by appellee on the contract was paid to appellant. It is admitted on the first page of appellant's answer that "on October 21, 1895, said Olson had paid the said Harding on said contract all of said consideration, except in the neighborhood of \$383.58," and appellant's counsel, in his argument, says:

"Olson made payments from time to time on such contract, in such amounts, that on October 21, 1895, the balance remaining unpaid was the sum of \$383.58, as alleged in the bill, admitted in the answers, and as shown by the proof. In addition he paid the taxes and assessments from time to time on the property. All these payments are stated in the master's report of findings and conclusions. There was no dispute in the Circuit Court, and there is none here, as to the amount of payments and the amount remaining unpaid."

Exclusive of these admissions and considering only the proof, we are of opinion that the court would have been fully justified in finding that the money paid on the contract price was paid to appellant.

Appellant's counsel urges that there was proof of occupancy of the premises in question, which operated as notice to the judgment creditors in the judgments in question of the state of the title. Perhaps, if this were true, it might be relevant on a bill filed against the judgment creditors to remove the cloud of their judgments, but we are at a loss to perceive how it can be relevant in the present case. Were it relevant, we would find no difficulty in agreeing with the finding of the master, that there was no occupancy proved sufficient to charge the creditors with knowledge of the title.

Appellant's counsel further objects that appellant was not allowed a reasonable time in which to perfect the title. We think this proposition contrary to the evidence. When the contract was executed January 3, 1890, appellant knew that, at any time after January 3, 1892, appellee would have the right, under the contract, to pay the balance of

the consideration unpaid and demand a deed. It is expressly admitted in appellant's answer to the original bill, that in August, 1895, Olson stated to appellant that he was ready to pay the balance due and desired appellant to execute and deliver to him a conveyance of the premises free and clear of all incumbrance.

October 21, 1895, appellee made a tender of the balance then due, and demanded a conveyance in accordance with the contract, within five days from that date. After making the demand, appellee waited till December 3, 1895, before filing his bill. From August 2, 1895, when the first demand was made, till December 3, 1895, when the bill was filed, was four months, and from October 21, 1895, to December 3, 1895, was forty-two days. We do not think it necessary to cite authorities in support of the proposition that a reasonable time to perfect the title was allowed to appellant. The fact that appellant's insurance company, whose business he says he controlled, was engaged in contesting just claims, is certainly not a sufficient excuse for non-compliance with his contract with appellee.

It is further contended that appellant's objection to the jurisdiction of the court should have been sustained.

Appellant's answer to the original bill contains no objection to the jurisdiction, and does not set up what is now urged in argument—that appellee had a remedy at law. The original bill and the answer thereto were referred to the master to take proofs and report, without objection by appellant. Appellant appeared before the master in person and by attorney, cross-examined appellee's witnesses and introduced evidence in his own behalf, and never made the objection that appellee's remedy was at law, until January 14, 1897, when he raised the objection by his cross-bill, then filed.

In *Stout v. Cook*, 41 Ill. 447, cited with approval in *Magee v. Magee*, 51 Id. 500, the court say: "The objection that, in the case before the court, there was a complete remedy at law, comes too late after having filed an answer without taking the exception." The court then proceeds

to quote with approval the following from Daniell's Chancery Practice: "If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has an adequate remedy at law. This objection should be taken at the earliest opportunity," etc. See, also, *Gage v. Griffin*, 103 Ill. 41, 44; *Crawford v. Schmitz*, 139 Ib. 564, 571; *Clemmer v. Drovers' Nat. Bank*, 157 Ib. 206, 217, 218; *Kaufman v. Wiener*, 169 Ib. 596, 600-1.

Appellant not only submitted to the jurisdiction of the court as heretofore stated, but by his cross-bill filed April 1, 1896, and his amended cross-bill filed January 14, 1897, himself sought equitable relief, namely, specific performance by appellee of the contract. Appellee's contract not having been recorded, a tender of the contract to appellant before bringing suit was unnecessary. In *Eames v. Der Germania Turn Verein*, 8 Ill. App. 663, cited by counsel, the contract had been recorded.

It is urged that the Chicago Real Estate Loan and Trust Company was a necessary party to the suit. It appears from the evidence that that company has no substantial or beneficial interest in the premises, and no relief is sought against it by the bill, nor is any granted by the decree. It is a mere naked legal trustee, and appellee, by his bill, does not seek to interfere in any way with the legal title. He merely seeks cancellation of the contract and a return of the money paid by him to appellant in pursuance of the contract. Under these circumstances we do not consider the Chicago Real Estate Loan and Trust Company a necessary party.

The amended cross-bill was filed, as before stated, after the proofs were all taken, and the court sustained a demurrer to it, and appellant, on the hearing, electing to stand by the cross-bill, the court dismissed it. This is assigned as error. A cross-bill between parties to the suit "is to be regarded as an adjunct or part of the original suit, and the whole together as constituting but one case." *Fleece v. Russell et al.*, 13 Ill. 31.

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This being true, the court, in passing on the sufficiency of the cross-bill, could properly consider it in connection with the other pleadings in the case. Having carefully read and considered the cross-bill, we are of opinion that it alleges no facts which, if proved, would constitute a valid defense to the bill or entitle appellant to any affirmative relief. This being the case, the demurrer was properly sustained (*Wing et al. v. Goodman*, 75 Ill. 159; *Hook v. Richeson et al.*, 115 Id. 431, 443); and as appellant did not ask leave to amend the cross-bill, but elected to stand by it, the court could not do otherwise than dismiss it. *Knapp v. Marshall*, 26 Ill. 63. The decree will be affirmed.

Adolph Arnold, Herman Arnold, Theodore Arnold and Benjamin F. Baker v. John Lomicky.

1. INSTRUCTIONS—*Not to Assume Controverted Facts.*—An instruction which assumes the existence of a material controverted point in the case is erroneous.

Assumpsit, for moneys deposited in a bank. Trial in the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendants. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed May 26, 1898.

ESCHENBURG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

COLLINS & FLETCHER, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court. The appeal in this case involves the same questions, in part, as presented by No. 7455, *Arnold et al. v. Cannon*, ante 323, and *Arnold et al. v. Hart*, No. 7339, decided at this term. What is said in the opinions in those two cases, disposes of the same questions here presented.

Complaint is also made that the court gave to the jury an instruction, viz. :

“The jury are instructed that in giving credit to the firm of Arnold Bros., Baker & Co., the plaintiff gave credit to each member of the copartnership, regardless of his acquaintance with the partners or of his opinion of their financial strength or standing, and that no partner can escape from liability because he was not particularly trusted by the plaintiff.”

This instruction is, in our opinion, erroneous in assuming, as it does, that the plaintiff gave credit to the firm of Arnold Bros., Baker & Co., which was an assumption by the court of one of the principal points of contest in the case, as to which, it might well be claimed, the evidence would have supported a verdict in favor of defendants.

We think it was especially calculated to affect the verdict of the jury in view of the fact that while plaintiff was a former dealer, in connection with a partner named Lang, with Arnold Bros., Baker & Co., his personal account with the Haymarket Produce Bank was not opened until near three months after the dissolution of the firm of Arnold Bros., Baker & Co.

For the error of the court in giving the instruction above set out and the two instructions quoted in the opinion in No. 7455, Arnold et al. v. Cannon, the judgment will be reversed and the cause remanded.

Adolph Arnold, Herman Arnold, Theodore Arnold and Benjamin Baker v. Gottlieb Gehring.

1. APPELLATE COURT PRACTICE—*What the Abstract Must Show.*—Where a party desires to raise the question of proof of a joint liability in the Appellate Court he must present an abstract showing the evidence upon which he relies to sustain his point. Otherwise the court will not go to the record for the information.

Assumpsit, for money deposited in a bank. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Ver-

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dict and judgment for plaintiff. Defendant appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 26, 1898.

ESCHENBURG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

HENRY M. COBURN, attorney for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This was an action of assumpsit by appellee against appellants. The appellants, Adolph Arnold, Herman Arnold and Theodore Arnold, filed jointly a plea of non-assumpsit, and also, jointly, a plea of non-joint liability, verified. Benjamin F. Baker, appellant, filed like pleas. The pleas of non-joint liability are not abstracted.

The appellants' counsel object that the plaintiff (appellee here) failed to prove partnership or joint liability of the defendants. The proof was that Adolph Arnold, Herman Arnold, Theodore Arnold, Benjamin F. Baker, the appellants, and Arthur J. Howe and C. A. Bodenschatz, were partners.

The abstract does not show that there were any defendants to the suit except the appellants above named, but for aught the court can know to the contrary from the abstract, the above persons, proved to be partners, were all defendants to the suit, and judgment was rendered against all of them. Appellants' counsel, in his argument, says C. A. Bodenschatz was not a party to the suit, and intimates that G. A. Bodenschatz was; but this does not, in any way, appear in the abstract, and the court, looking to the abstract, can not determine whether the persons proved to be partners were, or not, the persons sued, and against whom judgment was rendered, and the court will not, in this case, go to the record for information. *Gibler v. City of Mattoon*, 167 Ill. 18; *Dickenson v. Gray*, 72 Ill. App. 55.

Appellants were bankers, and the suit is to recover the amount of deposit made at their bank by appellee. One of the conditions of the withdrawal of money from the

bank by a customer or depositor appears to have been the presentation by the depositor of his pass book at the counter of the bank, and appellants' counsel object that there was no proof of such presentation. The appellee testified as follows: "After the bank was broke I told them I wanted my money. I didn't get it back." This was all the evidence on the question. Appellee was not cross-examined, not was any evidence introduced to contradict him. We are of opinion that this evidence was sufficient to justify a finding that the bank had failed and was insolvent before suit brought, in which case the law did not require the presentation of the pass-book. *Arnold v. Hart*, 75 Ill. App. 165.

It is further objected that the interest allowed by the verdict and judgment is too much by the sum of \$1.47. The conditions introduced in evidence as to how interest on deposits should be reckoned and for what times, etc., are quite complicated. It was proved on the trial that the interest reckoned in the prescribed manner was \$28.62, the amount allowed, and no evidence was introduced to the contrary.

The judgment will be affirmed.

Edwin J. Bradford v. The Neill & Mahnke Construction Co. et al.

1. **ACCEPTANCES—*Rights of the Acceptor.***—An acceptor of a draft either satisfies himself out of the funds of the drawer which he has in his possession, or he may recover of the drawer the amount which he pays on it; but in no case can he bring an action against the drawer or charge the amount of the bill in the account of the drawer before he actually pays it, and thus discharges the drawer from all responsibility.

2. **MECHANICS' LIENS—*Not Defeated by the Receipt of Acceptances.***—A contractor in the course of the construction of a building drew several drafts upon the owners of the premises in favor of and delivered them to a company furnishing material, and which were accepted by such owners but nothing was paid upon them. In the absence of an agreement to receive the acceptances as payments it was held that they could not be

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considered as such to defeat the right of the contractor to a mechanic's lien.

3. **BILLS OF EXCHANGE—When Dishonored—Rights of Creditors.**—A debtor breaks his contract to pay, when his bill or note is dishonored; and if the creditor, who has parted with value, sues for the original consideration, the authorities predominate in favor of allowing him to recover.

4. **PROMISSORY NOTES—When Taken as Payments.**—The mere giving of a note or other negotiable security, unless specially agreed to be received as payment, is treated, *prima facie*, as a conditional payment only.

5. **SAME—Recovery on the Original Consideration.**—The court cites authorities in support of the proposition that if a note or bill is lost, or can not be produced on the trial for cancellation, a recovery may be had on the original consideration.

6. **SAME—Expression “Prima Facie Payment” Explained.**—The expression found in the text books and some of the decisions, that the giving of a note is *prima facie* conditional payment, only tends to confuse the subject. It can only mean that when the holder is paid the amount evidenced by the note, then and then only, the debt is paid.

Mechanic's Lien.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Hearing. Bill dismissed. Appeal by complainant. Heard in this court at the October term, 1897. Reversed and remanded with directions. Opinion filed June 18, 1898.

LINDEN & DEMPSEY, attorneys for appellant.

By the acceptance of an order from the contractor to the owner, requesting him to pay the amount due to a third person, the mechanic's lien for that amount is not obliterated or destroyed, but the holder of the order becomes entitled to the avails of the lien to the extent of the amount of the order, and equity will enforce the lien for his use and benefit. The contractor remains the legal owner of the lien, and suit to enforce it is properly brought in his name. *Major v. Collins*, 11 Ill. App. 658; *Phoenix Ins. Co. v. Batchen*, 6 Ill. App. 621; *Cairo & V. R. Ry. Co. v. Fackney*, 78 Ill. 116; *Standard Oil Co. v. Sowden*, 45 N. E. Rep. 320; *Weber v. Bushnell*, 69 Ill. App. 25; *Bayard v. McGraw*, 1 Ill. App. 141; *Friedman v. Roderick*, 20 Ill. App. 622; *Phillips on Mechanics' Liens*, Sec. 278; 2 *Jones on Liens*, Secs. 1494–5–8.

It is not material, so far as the defendant is concerned, that an action is not expressly brought for the use of the

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beneficiary. *Standard Oil Co. v. Sowden*, 45 N. E. Rep. 320; *Weber v. Bushnell*, 69 Ill. App. 25; *Union National Bank v. Post*, 64 Ill. App. 404; *Hobson v. McCambridge*, 130 Ill. 367.

The delivery and acceptance of an order for a sum of money does not operate to extinguish the original indebtedness, but at most merely suspends the right of action thereon until the failure of the acceptor to pay the bill. Refusal to pay revives the original right of action. *Tiedeman on Negotiable Instruments*, 209; 1 *Daniel on Negotiable Instruments*, 395; 2 *Id.* 264.

The drawing of a draft by a lienholder for the lien debt, the acceptance of it by the debtor and a transfer of the draft to a third person, do not constitute an assignment of the lien to such third party. 2 *Jones on Liens*, Sec. 1494; *First National Bank v. Day*, 64 Ia. 118.

JESSE A. & HENRY R. BALDWIN, attorneys for appellees, contended that an order or bill of exchange, when accepted by the drawee, operates as an assignment *pro tanto* to the account of the payee of the funds of the drawer in the drawee's hands, citing *Moore v. Gravelot*, 3 Ill. App. 442; *Wood's Byles' Bills and Notes*, Sec. 34; *Tiedeman on Commercial Paper*, Sec. 5 B; 1 *Parsons' Bills and Notes*, 331; 1 *Daniel on Negotiable Instruments*, Sec. 18; *Norton on Bills and Notes*, Sec. 69; *Union National Bank v. Oceania County Bank*, 80 Ill. 212; *Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343; *Abt v. American Trust & Savings Bank*, 159 Ill. 467, and cases cited.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The appellant, Edwin J. Bradford, filed a petition for a mechanic's lien, making the Neill & Mahnke Construction Company, Minnie Mahnke, Euphemia Neill and others defendants. After the issues were made up the cause was referred to a master to take proofs and report the same to

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the court with his opinion on the law and evidence. The master reported in favor of the appellant, and that there was due him \$474.94, and that the same was a lien on the premises described in the petition, and recommended a decree accordingly. The court sustained exceptions made by appellees to the report and dismissed the bill.

The appellees Minnie Mahnke and Euphemia Neill were the owners of lots 41 and 42 in Averill's subdivision of the S. E. $\frac{1}{4}$ of Sec. 3, township 38 north, range 14 east of the third principal meridian, in Cook county, Illinois. June 4, 1895, the Neill & Mahnke Construction Company and Johnstone Gregory, appellees, acting for and being authorized thereto by Euphemia Neill and Minnie Mahnke, contracted in writing with appellant to furnish all the labor and material necessary for the completion of plumbing, sewer-ing and gasfitting in two three-story and basement flat buildings then being erected in the above described premises. By the terms of the contract the work was to be completed August 1, 1895, or as soon thereafter as the progress of other contractors would allow. The contract price of the work was \$1,080, and appellant did extra work of the value of \$56. The work was substantially completed about October 9, 1893. It appears that appellant was delayed in his work by other contractors. The total amount of payments made to appellant on the contract, excluding from consideration certain acceptances hereinafter mentioned, was \$610, leaving due him, after the allowance of certain credits to which the owners were entitled, a balance of \$474.94.

It is conceded that appellant filed in December, 1895, within the time limited by the statute, a sufficient statement of his claim, on the hypothesis that there was any amount due him at that time. While the work was being performed by appellant he drew three orders or drafts on the Neill & Mahnke Construction Company in favor of the Sanitary Specialty Manufacturing Company, the latter company having furnished appellant with material to be used in the performance of his contract. The orders

were of the following dates and for the following amounts: August 19, 1895, \$200; September 4, 1895, \$65; September 20, 1895, \$260.52. The first order was accepted by the Neill & Mahnke Construction Company August 22, 1895, "payable out of next draw." The second order was indorsed by said company, "accepted as above," and the third was accepted by the company, less \$17.25, making the total of acceptances \$508.27. The orders with the acceptances were delivered by appellant to the Sanitary Specialty Manufacturing Company, a firm composed of Robert Sproul, William T. McGur-in and Herman Verbeek, and nothing has ever been paid on any of the orders. On the hearing before the master these orders were produced and counsel for appellant offered to hold them subject to the order of the court, to be canceled in the event of a sale of the premises by decree of the court. It also appears from a petition in the record of Herman Verbeek and others, the payees in the orders, which petition the court refuse permission to file, that Verbeek was present at the taking of the proofs before the master, and consented to the surrender and cancellation of the acceptances, and in and by his petition so consented, and further offered to dismiss a suit at law which theretofore, and prior to the commencement of the present suit, he had brought on the acceptances against the Neill & Mahnke Construction Company.

The contention of the appellees is that, after the acceptances were delivered to the Sanitary Specialty Manufacturing Company, appellant ceased to have any claim for any balance due under his contract, such balance being wholly included in the acceptances, and that, thereafter, he could not legally file any statement or claim of lien. This, necessarily, involves the premise that the acceptances were equivalent, in law, to a payment to appellant of the balance due him. If the acceptances so operated, then the acceptor might legally have charged appellant, the drawer, with the amount of the acceptances. But such is not the law.

" The acceptor either satisfies himself out of funds of the

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drawer which he has in his possession, or he may recover of the drawer the amount which he *pays* on the bill. But in no case can he bring an action against the drawer, or charge the amount of the bill in the account of the drawer *before he actually paid the bill*, and thus discharge the drawer from all responsibility." Tiedeman on Comm. Paper, Sec. 209, citing Braxton v. Willing et al., 4 Call. (Va.) 288, and Planters Bank et al. v. Douglas et al., 2 Head. (39 Tenn.) 699, which fully support the text.

See also Story's Bills of Exchange, 4th Ed., Sec. 420, and 2 Randolph on Comm. Paper, Sec. 628, to the same effect. The non-payment of the orders left appellant still liable and responsible to the Sanitary Specialty Manufacturing Company.

"The debtor has broken his contract to pay when his bill or note is dishonored, and if the creditor, who has parted with value, sues for the original consideration, the authorities predominate in favor of allowing him to recover." 2 Daniel on Neg. Insts., 2d Ed., Sec. 1261, citing a large number of cases.

In McConnell et al. v. Stettinius et al., 2 Gilm. 707, the action was assumpsit; one of the defendants was defaulted and the other pleaded that the amount sued for had been settled by the execution by one of the defendants to the plaintiffs of a negotiable promissory note, and that the plaintiffs had assigned the note to one Homans, without recourse, etc. The plaintiffs replied that at the commencement of the suit they had the note in their possession, etc. The court held the replication good, saying: "It is well settled that the mere giving a negotiable note, or its indorsement to a third person, does not extinguish the original cause of action if the payee can show that the note has been lost or can produce it on the trial to be canceled."

The following authorities support the proposition that if the note or bill is lost, or can be produced on the trial for cancellation, a recovery may be had on the original consideration. Miller v. Lumsden, 16 Ill. 161; Stevens v. Bradley, 22 Ib. 244; Heartt v. Rhodes, 66 Ib. 351.

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The merely giving a note or other negotiable security, unless specially agreed to be received as payment, is treated *prima facie* as conditional payment only. Rayburn et al. v. Day, 27 Ill. 46; Heartt v. Rhodes, *supra*; Bailey et al. v. Pardridge et al., 134 Ib. 188; Van Court v. Bushnell, 21 Ib. 626; Paddock et al. v. Stout et al., 121 Ib. 571.

Held, in the last two cases, that the taking of a note did not discharge the lien.

The expression found in the text books and some of the decisions, that the giving a note is *prima facie* conditional payment only, tends to confuse the subject. It can only mean that when the holder of the note is paid the amount evidenced by it, then and then only is the debt paid, necessarily implying that the mere giving of the note is not, in and of itself, payment, and what is thus necessarily implied may be expressed more plainly in fewer words.

In Bayard et al. v. McGraw et al., 1 Ill. App. 134, it appeared that the petitioners for a mechanic's lien had received from the owner, on account of money due them on their contract with him, four promissory notes which they had negotiated. The owner having failed to pay the notes, took up three of them by renewal notes to the holder, and judgments were recovered on two of the renewal notes in the name of the contractor, and on one of them in the name of the holder. It was claimed that the lien was waived or extinguished as to the amount evidenced by the notes. But the court held not, saying: "When the money is due and the note is taken for the accommodation of the debtor who is then in default and unable to pay, and with the understanding by the parties that it is to be negotiated, we do not see that the act of negotiating adds any force to the act of taking it; nor would the further proceeding to judgment thereon by the holder. But in either case the lien creditor, before he can have his decree, must be in control of the note or judgment, whichever is in force, and offer to surrender or cancel it."

The last case is cited with approval in Chisholm v. Randolph, 21 Ill. App. 312. Counsel for appellees contend that

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the acceptances were received by appellant as payment. Whether they were so accepted or not, depends upon what was the understanding and intention of the parties. The following occurred in the examination in chief of appellant:

Q. "Was any conversation had at any time about these orders that have been offered in evidence directed to the Sanitary Specialty Manufacturing Company?" A. "Yes, sir. They said they would accept orders for material if I would give orders, and pay the material bills, which was just as satisfactory to me as the cash," etc.

It is very clear that this does not show any agreement to receive the acceptance as payment. The last part of the witness' answer, viz., "which was just as satisfactory to me as the cash," does not purport to be a statement made by him to the drawee of the orders, but merely a statement thrown out by him at the hearing. Of course, if the acceptor had done as he says in his answer it promised, viz., not only accept orders for material, but pay the material bills, it would have been as satisfactory to appellant as cash. It would have been the equivalent of cash had the Neill & Mahnke Construction Company paid bills for material which appellant owed.

On cross-examination of appellant the following occurred:

Q. "These different orders which you gave for materials and for labor, and which Mr. Neill said would be accepted, you have stated that you said to him that that would be just as satisfactory to you as payment to you in cash, is that right?" A. "Yes, sir."

The question was well calculated to mislead, and, as his subsequent examination shows, did mislead the witness. He had not testified that he told Neill or any one else, that the acceptances would be as satisfactory to him as cash, and on his redirect examination he testified that the answer last above quoted is incorrect. He says: "It is incorrect in the fact that the mere acceptance of the orders would not be the payment of cash, and my having them accepted. The agreement was to accept them and pay the Sanitary people the money called for in the orders. I wanted it understood that the orders would be paid."

We think the evidence falls far short of showing an agreement to receive the acceptances as payment. Much of the argument of appellant's counsel is devoted to discussing the claims of Sproul and others, composing the Sanitary Specialty Manufacturing Company, who furnished material to appellant, and in whose favor the orders in question were drawn, and the refusal of the court to allow the filing of their petition for leave to intervene is assigned as error. Sproul and his partners have not, nor has any of them, appealed, nor assigned cross-errors, neither have they entered an appearance in person or by attorney, and we fail to perceive how the refusal of the court to permit them to file a petition can in the least affect appellant's rights in the premises.

The master recommended as follows: "I therefore recommend, if the complainant shall produce and surrender the orders in question, to be canceled upon the satisfaction of a decree herein for the amount so found to be due, that a decree be entered herein establishing a lien upon the premises in question for said sum of \$474.94, according to the prayer of the bill of complaint, and directing the payment to complainant of said sum within a time to be fixed by said decree, and that in default thereof, the said land, buildings and premises, or so much thereof as shall be necessary for the satisfaction of such decree, be ordered and decreed to be sold under and in accordance with the provisions and requirements of the statutes in such case made and provided." The decree will be reversed and remanded, with directions to enter a decree as recommended by the master. Reversed and remanded, with directions.

Chicago City Railway Co. v. Bridget Roach.

1. NEGLIGENCE—*Rate of Speed — Grip Cars — Crowded Streets.*—Whether a rate of speed equal to six miles an hour, in the streets of a city crowded with teams and people on foot, is negligence on the part of a cable car company, is a question dependent upon the surrounding circumstances, and is for the determination of the jury.

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2. INSTRUCTIONS—*Court Not Bound to Repeat.*—A trial court is not bound to repeat instructions.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Verdict for plaintiff, \$2,000. Remittitur for \$500. Judgment for \$1,500. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed. Opinion filed June 18, 1898.

STATEMENT.

This suit was brought by appellee to recover for personal injuries received through alleged negligence of appellant. The negligence charged was in moving a train of appellant on Lake street at its intersection with State street, in Chicago, at a high and dangerous rate of speed.

Appellee had been traveling south on the east side of State street, and had stopped at Lake street and stood at the northeast corner of the street crossing beside a police officer who was stationed there. Appellee waited there for an opportunity to cross Lake street. There were teams upon Lake street, some passing and some standing in front of stores. One team, driven by the witness Benson, was trying to proceed east on Lake street, and was prevented by other teams standing or moving ahead. This team, when prevented from going further, was near to the curve of the car tracks, either west of the curve or south of the curve, as variously stated by witnesses, but not so near that a car might not have passed it. The police officer ordered the driver of the team to cross over to the other (north) side of Lake street. The driver undertook to obey, and while turning to cross over, the rear of the wagon was brought near enough to the curve of the track of the appellant to be struck by a train which was approaching on Lake street from the east and was passing over the curve from Lake to State streets. The wagon thus struck by appellant's train was thrown against appellee, and she was thereby injured. The only evidence as to the speed of the train would show that it was going at the rate of about six miles an hour. The police officer testified as to the accident as follows:

"Shortly before nine o'clock there was a west-bound Cottage Grove avenue car in Lake street, and at the time it started from Wabash avenue there was a team with a load of heavy merchandise, of hardware, backed up at Markley-Alling's hardware store, which I should judge is about sixty feet east of crossing on south side of Lake Street. Between there and curve of Chicago City Railway Company's tracks there would be room for about four wagons, and at that time space was filled up with wagons. A man driving a wagon belonging to Alston Manufacturing Company, coming from the west, was on the right side of the street; came along as far as curve. Could not get any further on account of wagon that was ahead of him. Car was approaching, and so as to leave car go by and prevent blockade, I ordered the man to come across on the other side of street—go down on left side north of Lake street. In attempting to do so the grip car struck wagon and as result of its striking wagon Mrs. Roach was knocked down, and I received a little injury myself. First saw wagon marked 'Alston Manufacturing Company' when it pulled over the tracks on the south side of Lake street going east. It was a single truck—one-horse wagon. Name of driver is John A. Benson. I ordered the man to go on the other side of the street; then signaled the gripman to stop; held up my club in regular manner that we have for stopping teams and cars—and whistled at him. Gripman at this time was about thirty feet from wagon. There was nothing between me and gripman. When I told teamster to pull over, he did so, and the middle of the wagon had got about on the further (north) track when the gripman struck it. I had a team stopped coming west to leave those people, Mrs. Roach and a few others that were standing there, cross the street. That team was standing east of Lake street crossing, near the sidewalk. When I ordered this man out there was a double team coming in ahead of him going east. He could not for that reason get out probably as fast as he might. Wagon at the time it was struck was moving very slowly."

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T. W. Wittler testified: "Saw her standing beside policeman on the crossing. There was a wagon in the way. There was one wagon going west and another going east, and I was waiting for them to pass when a cable train came along and struck the wagon that was standing directly in front of cable train on track close to curve. Hit it so hard that it slewed around and struck this Mrs. Roach and policeman, knocking Mrs. Roach down and policeman up against wheel of another wagon. Saw Mrs. Roach lying on street in front of wagon going west, within about a foot of front wheel, and I saw some one pick her up and take her into Pitkins & Brooks' store. That is all I saw of the accident. She appeared to be unconscious and her face was bloody. I paid no attention to direction of traffic. Grip car, after it struck wagon, went around curve and crossed crossing on south side of Lake street. When I first saw the car I should judge it was about sixty feet from wagon. The car coming came at full speed, in my opinion. Saw it all the time from time I first saw it until it struck the wagon. When I first saw the wagon think the car was ten or twelve feet from it. I think the rate of speed was about six miles an hour then."

Benson, the driver, testified: "There was some people standing on the crossing. Officer put his club toward the car, and then made a motion to me. He came over a couple of steps and said: 'Pull over on this side.' So I pulled over cornerways to the curve; then got by; got my front wagon at track over to sidewalk, and there was another team coming next to curb, on north side of State street; then there was another team ahead of me going east; I seen I could not get out there, and so I hollered to the gripman, 'Hold on.' Then he was about fifteen feet away from my wagon, and took my hind wheel; he was about fifteen feet from point of wagon; struck hind wheel; threw wagon over; in the place I was when the officer called me the car could clear me all right."

Evidence was presented by appellant to show that at the time Benson turned his wagon north, in obedience to the

command of the police officer, his wagon stood on the tracks of an old and abandoned portion of the railway of another company. It is claimed that in turning to get out of this track the rear of the wagon slid to the east by reason of the rails, and that thereby the collision was caused.

As to the injuries of appellee, there was a conflict in the evidence. There is no question but that some injury was sustained. Aside from the conflicting evidence as to other injury, it seems to be conclusively established that there is an injury to the knee not yet cured, and which the jury were warranted from the evidence in finding to be incurable. Appellee is about sixty years of age. Dr. Bradley, a witness for appellee, testified: "Examined her again about three weeks ago, and found more or less weakness in the knee joint, with apparent loosening of ligaments and relaxation of joints, so that there was an abnormal lateral motion. I believe the injuries are permanent; won't say with regard to eye, but with regard to knee."

Dr. Moyer, a witness for appellant, testified: "I should expect that the condition of the knee might make it a little uncertain on an uneven surface. I would attribute this condition of the knee to injury five years ago. Proper treatment would probably cure that knee, but left to itself in a woman of her age, it will not get well without treatment."

It is undisputed that, as a result of the injury, appellee has a permanent scar upon the forehead. Dr. Moyer testified: "She has a scar over the right eyebrow, extending to the inner side of the upper lid, but not going down to any extent on the lid; it then extends upward on to the forehead about one and a half inches; then there is a branch in the upper part of that going to the right, so that it is a little star-shaped; that scar has been made by merely cutting into the skin; the bone itself has not been injured beneath the scar; it is a narrow, white scar such as is made by a simple cut in the skin."

The trial resulted in a verdict for \$2,000, from which \$500 was remitted by appellee and a judgment entered for \$1,500.

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WILLIAM J. HYNES and JAMES W. DUNCAN, attorneys for appellant.

FRED H. ATWOOD, FRANK B. PEASE and C. E. CRUIKSHANK, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellant that the verdict is against the weight of the evidence. In this behalf it is urged that it appears from the evidence that the collision was caused by carelessness of the police officer, who directed the driver, Benson, to cross to the north side of Lake street; or by the carelessness of Benson in obeying the command when he was in a place of safety; or by the old track of the West Chicago Street R. R. Co., in which it is claimed Benson's wagon stood before turning north, the rails of which track, it is argued, caused the rear wheels of the wagon to slide along to the east as the horses and the front wheels turned north, and thus brought the rear of the wagon into dangerous proximity to the curve of appellant's tracks. It is also argued that appellee caused the injury through her own negligence in placing herself, it is claimed, in a position of danger. And, finally, counsel urge in this behalf that to move a train at the rate of speed shown by the evidence here can not be held to constitute any negligence.

The answer to all of these contentions is, that they together presented for the determination of the jury, upon the evidence here, two questions only, viz.: Whether there was negligence of appellant in moving its train at the speed shown, which operated as a proximate cause of the injury, and whether appellee was guilty of any contributory negligence. We are of opinion that the evidence warranted the jury in finding, as to each of these questions, favorably to appellee's right of recovery. The jury might well find that appellee, in choosing a place by the side of the policeman stationed at the crossing, while she was waiting an opportunity to cross over Lake street,

was not only not guilty of any contributory negligence, but was in the exercise of very commendable care. That appellant was guilty of negligence in moving its train at that place and under the conditions there existing, at the rate of speed shown, was also a fact which the jury might have found from the evidence.

Whether such rate of speed constituted negligence was a question dependent upon the surrounding circumstances, and was a question for the determination of the jury. The C. C. Ry. Co. v. Robinson, 127 Ill. 9; Rend v. C. W. D. Ry. Co., 8 Ill. App. 517; W. C. St. R. R. Co. v. Stoltenberg, 62 Ill. App. 420.

In the case last cited, it appeared that the car was moving "About as slow as a man would walk." This court, in passing upon the question of negligence there raised, said :

"Under the circumstances of the accident, the gripman being unable to tell that no one was waiting to come immediately from behind the wagon upon the crossing, it was a question for the jury whether appellant was not negligent in permitting its car to move toward the cross-walk at a rate of speed that prevented its being stopped ere it ran upon deceased."

Whether the gripman saw, or, if properly attending to his duty, should have seen the signal of the policeman; whether the wagon swung into the way of the train so suddenly that a collision was unavoidable if the car was moving at any rate of speed; and whether the occupancy of the streets by teams was such as to make it the duty of the gripman to proceed with great caution and at such a slow rate of speed as would enable him to stop his train within exceedingly short distances, were all questions of fact upon which the jury passed in determining the negligence of appellant, and its relation as a proximate cause of the injury.

The evidence being sufficient to sustain the finding that appellant was negligent as charged, and that such negligence was a proximate cause of the injury, the negligence

of the policeman or of Benson, the driver, if concurring, could not excuse appellant.

The only instructions given which are complained of in the briefs are three, which are numbered 1, 2 and 3 for convenience:

1. "You are instructed as a matter of law that the question of whether or not the plaintiff exercised ordinary care for her personal safety before and at the time of the occurrence of the injury complained of, is a question of fact to be determined by you from the evidence.

2. "You are further instructed as a matter of law that the question of whether or not the defendant was guilty of negligence is for your determination upon all the circumstances and facts proven in the case.

3. "You are instructed as a matter of law that if you find from the evidence that the defendant has been guilty of negligence, and that such negligence caused the injury to the plaintiff complained of in the declaration, and that before and at the time of such injury the plaintiff was in the exercise of ordinary care for her personal safety, then your verdict will be for the plaintiff."

The first and second of these instructions are undoubtedly correct as statements of the law, even if subject to the criticism invoked of giving too much emphasis to the power of the jury. We do not understand the decision in *C. B. & Q. R. Co. v. Greenfield*, 53 Ill. App. 424, as holding that the giving of such an instruction constituted reversible error.

No particular is pointed out by counsel wherein the third of these instructions is faulty, nor do we discover any. In support of objection to it, the case of *N. C. S. R. R. Co. v. Louis*, 138 Ill. 9, is cited. Upon examination of that decision, we find nothing to support the objection. In the case under consideration the jury were very fully instructed as to the burden of proof and the rule requiring a preponderance of the evidence.

It is complained that the court erred in refusing to give the following instructions, which we refer to as numbers 1 and 2:

1. "You are instructed, as a matter of law, that if you find from the evidence that the plaintiff in this case is entitled to recover, you should assess her damages at such a sum as would be a just compensation to the plaintiff for the injury sustained as shown by the evidence in the case.

2. "If the jury believe from the evidence that the injuries complained of were received as the result of the acts and doings of the policeman and the driver of the wagon, and without any want of ordinary care on the part of the gripman, then it is the duty of the jury to find in favor of the defendant."

The court properly refused each of these instructions, because each was sufficiently included and covered by other instructions given. The jury had been told that no exemplary damages could be awarded, and that such elements of damage only could be considered as had been shown by a preponderance of the evidence. They had also been instructed that if there was no want of ordinary care on the part of the gripman, and the accident happened as a result of circumstances over which he had no control, then there could be no recovery. The court was not bound to repeat these instructions.

It is complained by counsel for appellant that the court erred in ruling upon the admission of certain evidence. There was no error in permitting Dr. Moyer to testify as to the condition of the eye. If appellee had abandoned all claim by reason of any permanent injury to the eye, yet that did not preclude proper inquiry as to temporary conditions, if related to the injury in question.

The exclusion of an answer to the following question was excepted to :

"Standing where you say the car was, state whether or not, if the rig had remained as you saw it at that time, whether there was room for the car to pass without touching it?"

No harm could have resulted from its exclusion, for the witness was permitted to show the projection of the car over the rail and the distance of the wagon from the rail.

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Moreover, it was established by Benson, a witness for appellee, that there was room for the car to pass before Benson moved to the north.

An answer to the following question was excluded:

“You made those answers on the proposition of fact assumed by him in his questions?”

There was no error in such ruling, for the witness had already indicated that he did so base his answers, and there was no occasion for repeating.

In view of all the evidence as to the nature of appellee's injuries, we are of the opinion that the judgment is not for an excessive amount.

The judgment is affirmed.

Chicago City Railway v. Lizzie Sullivan.

1. NEGLIGENCE—*Getting upon Moving Cars.*—A person who attempts to get upon a moving car and is injured, is not in the exercise of ordinary care under the facts shown in this case.

2. INSTRUCTIONS—*Must be Asked in Apt Time.*—It is not error to refuse an instruction which is not asked in proper time.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Verdict for plaintiff for \$8,600. Remittitur for \$4,600. Judgment for \$4,000. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed June 18, 1898.

W. J. HYNES and W. J. FERRY, attorneys for appellant.

A. B. ST. JOHN and S. A. FRENCH, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

March 3, 1894, appellee, who was then a dressmaker, was injured while attempting to board one of appellant's cable cars (the rear one of a train consisting of a grip and two trailers), going south on State street, in Chicago, and after the train had passed Monroe street. She charged in the

first count of her declaration that appellant was negligent in not regarding its duty to run its cars in a careful manner, and to stop for a reasonable length of time at the intersection of State and Monroe streets, where it was appellant's custom to stop its cars to enable her to get on, but when she, with due care and diligence, was on the step of appellant's car and endeavoring to enter the same as a passenger, appellant carelessly and negligently caused said car to suddenly and violently start and move, whereby, etc. In the second count she charged that appellant was negligent in respect to the same duty, and while she, with due care and diligence, was attempting to get on the car as a passenger, and was upon the step of the car, appellant carelessly and negligently jerked and violently started and moved said car, whereby, etc. In an additional count she charged that appellant was negligent in respect to the same duty; that appellant reduced the speed of its train and slowed the same down while crossing Monroe street at the south side of Monroe street on State street; that the train came almost to a complete stop and scarcely moved; that she, with due care and diligence on her part, stepped upon the step of one of the cars, and was in the act of entering said car to be carried, etc., when the defendant, by its agents and servants in charge of said train, carelessly and negligently caused said train to be suddenly and violently started and jerked, whereby, etc. Appellant pleaded the general issue to all the counts, and a trial before the court and a jury resulted in a verdict for appellee of \$8,600. Appellant's motion for a new trial, after a remittitur of \$4,600 by appellee, was overruled and judgment entered for \$4,000, from which this appeal was taken.

It is claimed the trial court should have directed a verdict for appellant; that the verdict is against the evidence; that the court admitted improper testimony; that appellee's attorneys made improper statements to the jury; and that the verdict is excessive.

After all the evidence was closed and the arguments of counsel had been made to the jury, appellant, along with

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numerous instructions asked by the appellee, asked twenty-two instructions upon the merits of the questions submitted to the jury, and also one directing a verdict for defendant. The latter instruction was refused, in which there was no error. It came too late, and any right to have this instruction given was waived by previously arguing the case to the jury and submitting other instructions upon the facts with this one. *Ry. Co. v. Fishman*, 169 Ill. 197; *Wright v. Avery*, 172 Ill. 313.

Appellee's counsel in argument concede that when she attempted to board the car the train was moving, and therefore there could be no recovery under the first and second counts of the declaration, in which the negligence alleged was that appellant carelessly and negligently caused the car to suddenly and violently start and move. If this concession were not made, the verdict could not be sustained on the first and second counts, by the proof, which is overwhelming, that appellee attempted to board the car when it was moving. As to the additional count, we think its allegations are not established by a preponderance of the evidence. It alleges that the speed of the train was reduced—slowed down while crossing Monroe street; that the train came almost to a complete stop and scarcely moved, whereas the great preponderance of the evidence is that the train stopped with the rear of the last car at about the south side of Monroe street, and before appellee attempted to get on it, the train had started up and was moving at one-half its ordinary speed. Appellee swears that the car was slowing up all the time; that it did not stand—did not stop perfectly still; that it was moving at the time she tried to get on; that she thought it had stopped enough so she could get on; that she took hold of the railing at the rear end of the car—the rail of the dash on the rear end of the car—and did not know why she did not wait until it stopped altogether. She admits that she ran to get on the car, as to which several witnesses, both for appellee and appellant, agree with her.

Her witness, F. B. Miner, who was on the sidewalk on

the west side of State street going north toward Monroe street, says his attention was called to her by an exclamation of Mr. Moody at his side, saying "My God!" that when he looked she had hold of the rail of the car, and was partly swinging back, and that the next thing he knew they (appellee and Moody) were on the ground rolling over—both of them; that it was all done very quick, in a very few seconds, and that the car was moving, but as to the speed he could not answer. It is clear from his testimony that the speed of the train was sufficient to make it negligent, to say the least, for appellee to have attempted to board the car, moving as it was.

Anna Lyons, who was appellee's companion and one of her witnesses, aged seventeen years at the time of trial, swears that appellee saw the car coming from the north; it was north of Monroe street; that appellee then left witness; that appellee held an umbrella and muff in her right hand and "motioned the car to stop and the car stopped—that is, it slackened up;" that appellee got one foot on the lower step and one foot on the top step, and she held on to the railing around the back of the car with her left hand; that the car was moving very slow when she stepped on the platform, and as she got on the conductor rang the bell to go ahead; that the car jerked and she swung back—swung around backward; that as she fell she went over the dashboard, doubled right over like a ball, and was dragged about the length of two cars, and that the man who ran to her assistance and grabbed hold of her fell first, and he was picked up. On cross-examination she said the car was moving when she first saw it; was moving as she came over Monroe street and up to the time appellee tried to get on, at the time she got on, and for a considerable distance after she got on.

Mr. Moody, who was with Mr. Miner and ran to the assistance of appellee, testified that the train halted and appellee stepped on with her left foot, and as she raised herself up the car started; that she took hold of the railing with her left arm; that she wheeled around and shrieked;

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that he rushed up and grabbed her by the dress, and she came over, and "as she came the fender struck her and that broke my hold and threw me head over heels in the mud." On cross-examination he admitted that the train had not stopped still: that it kept going at a greater or less speed all the time from the time he first noticed it until appellee fell. On re-direct examination he testified that he thought she was doing a foolish thing, because at the time she started for the train he did not think the train was going to stop. On re-cross examination he said: "I looked at her because I knew the train would kill her if it did not stop; that is what aroused me; it was going at full speed at that time; I can't say full speed, but as fast as they run—the usual speed." The time then referred to was immediately after appellee had put her foot on the step of the car.

We think that when the statements of these witnesses, that appellee took hold of the rear railing with her left hand and swung around, was rolled over like a ball, that Moody, who went to her assistance, was also thrown down, and that it all happened so quickly, and that Moody made the exclamation he did, are considered in connection with the evidence in behalf of the defense, it is apparent that the train was moving quite rapidly when appellee attempted to get on, and had not slowed down, and was not going very slow, as she claimed.

On behalf of appellant, seven witnesses, six of whom appear to be wholly disinterested, testify that the train had come to a stop about the south side of Monroe street, and at the time appellee attempted to board it, it had started up and had attained at least one-half the usual speed. These witnesses appear to have had good opportunities of observation as to the circumstances of the accident, and when their evidence is considered in connection with that of appellee and her witnesses, we think the clear weight of the evidence is, that instead of the speed of the train being reduced, slowed down, instead of its having come almost to a complete stop and scarcely moving at the time appellee attempted to board it, as alleged by her, the train was mov-

ing quite rapidly, and therefore the preponderance of proof does not sustain the verdict of the jury. This conclusion makes it unnecessary to consider the other points argued, and inasmuch as upon another trial any error in these respects may be avoided, we do not discuss them.

The judgment will be reversed and the cause remanded.

Charles H. Lawrence v. Joseph E. Paden and Martin M. Gridley.

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1. **APPEALS**—*Unknown to the Common Law.*—Appeals are unknown to the common law, and exist solely by virtue of the statute, and the statute allows appeals only from all final judgments, orders and decrees.

2. **CROSS-BILL**—*When Unnecessary.*—A cross-bill would seem to be unnecessary as between the defendants to a bill of interpleader.

3. **INTERPLEADER**—*What is Necessary for Defendants to Set Up.*—It is only necessary for the defendants to a bill of interpleader to set up their grounds of claim or right to the subject-matter of the bill, and the court can then adjudge who has the better right, and, under the prayer of the bill, decree accordingly.

4. **FINAL JUDGMENT**—*What Is Not.*—If the judgment of the trial court leaves either party at liberty to again apply to that court for relief, the judgment is not final and no appeal can be taken from it.

5. **SAME**—*As to Several Defendants.*—If a case against several defendants is finally disposed of as to one, leaving other proceedings to be had to determine the matters as to others, there is no such final judgment as the law contemplates as the basis of an appeal.

Bill of Interpleader and Cross-bill.—Trial in the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Hearing and cross-bill stricken from the files. Appeal. Heard in this court at the October term, 1897. Appeal dismissed. Opinion filed June 18, 1898.

WM. SHERMAN CARSON, attorney for appellant, contended that the court erred in striking the cross-bill of appellant from the files, upon motion. Such motion was contrary to the established practice, and deprived appellant of all rights of amendment under the statute. Citing (as to practice): *Johnson v. Freeport & M. R. R.*

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Co., 111 Ill. 413; Dupuy v. Gibson, 36 Ill. 197; Johnson v. Freeport & M. R. R. Co., 116 Ill. 525; Judson v. Stephens, 75 Ill. 255; Orne v. Cook, 31 Ill. 238; Thomas v. Adams, 30 Ill. 37; Town of Tamaroa v. Trustees, 54 Ill. 334.

(As to effect of motion :) Grimes v. Grimes, 143 Ill. 556; Thomas v. Adams, 30 Ill. 37; Vieley v. Thompson, 44 Ill. 9; Johnson v. Freeport & M. R. R. Co., 111 Ill. 413.

(As to elements of the bill :) 2 Story on Eq. Juris., Secs. 806, 807; 3 Pomeroy on Eq. Juris., Sec. 1320; National Live Stock Bank v. Platte Valley State Bank, 54 Ill. App. 486; Livingston v. Bank of Montreal, 50 Ill. App. 567.

(The cross-bill was authorized :) Owen et al. v. Apel, 68 Ill. 391; Starr & Curtis' Rev. Stat., Chap. 22, Sec. 30.

The court erred in denying to appellant the right to proceed under his cross-bill. Jones v. Smith, 14 Ill. 230; Robins v. Swain, 68 Ill. 197; Peoria & Springfield R. R. Co. v. Bryan, 5 Ill. App. 387.

PADEN & GRIDLEY, attorneys for appellees.

It is a universal law that appeals can only be taken from and the review of an appellate court had upon final judgments, orders and decrees of the trial court. Furthermore, there must be a final disposition of the whole case. If a case against several is finally disposed of as to one, leaving other proceedings to be had to determine the matters as to others, there is no such final judgment as the law contemplates as the basis of an appeal. Shinn's Pleading & Practice, Sec. 1013; Sholty v. Sholty, 140 Ill. 82; McCormick v. West Chicago Park Com., 118 Ill. 655; Farson v. Gorham, 117 Ill. 137; International Bank v. Jenkins, 109 Ill. 219.

A writ of error will not lie except to a final order of court. So if a bill is dismissed as to one or more parties, the complainant can not prosecute a writ of error until there has been a final disposition of the case as to all other parties. A cause of action can not be reviewed as to one party at one time and as to another party at another time. Thompson v. Follansbee et al., 55 Ill. 427.

It is essential to an interpleader that the party seeking relief should have incurred no independent liability to either party, and should have acknowledged the title of neither. If he has come under any personal obligation to either of the claimants in respect to the specific property in dispute independently of the question of title, so that the whole of the rights claimed by the defendants can not properly be determined in litigation between them, it is not a proper case for interpleader. The case of landlord and tenant and principal and agent, already stated, are illustrations of this rule. Bispham's Equity, 421.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an order striking from the files a cross-bill of appellant.

January 19, 1897, John Gould filed a bill of interpleader making John E. Townsend, Joseph E. Paden, Martin M. Gridley, and Charles H. Lawrence, the appellant, defendants thereto. The bill avers, in substance, that April 27, 1895, the complainant, Gould, leased from Townsend certain premises, described in the bill, for twenty-four months, at a monthly rental of \$40 per month, and that he had paid the rent up to the end of October, 1895; that November 5, 1895, he was notified in writing by Charles H. Lawrence that a written contract had been entered into between Lawrence and Townsend for the purchase by the latter from the former of the premises; that Townsend had not complied with his contract and the title was still in Lawrence, and that he, Lawrence, would look to Gould for the rent; that November 14, 1896, the complainant received from Paden & Gridley a notice that Townsend had assigned to them the amount of rent then due, and also at same date, a notice of said assignment from Townsend; that Paden & Gridley threatened to bring suit for the rent, and that January 12, 1897, Lawrence demanded of complainant possession of the premises, and January 14, 1897, commenced an action of forcible detainer to recover such possession before a jus-

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tice of the peace. The complainant offered to bring the rent into court and pay it to whomsoever the court might direct and prayed that the defendants might interplead, etc. Townsend, Paden and Gridley demurred to the bill, and February 9, 1897, the demurrer was sustained and the bill dismissed as to them, thus leaving Lawrence the sole defendant to the bill.

February 25, 1897, Lawrence filed an answer to the bill, averring, among other things, that August 12, 1894, he was the owner of lots 8, 9, 10 and 13 in a certain subdivision, the leased premises being a part of lot 10, and that, at that date, he entered into a contract with Townsend for the purchase by the latter of said premises. The answer then sets out the contract, which is quite complicated, claims that Townsend did not comply with it, and that November 13, 1896, he served a notice on Townsend that unless, within thirty days from that date, he should comply with his contract, it would be declared forfeited, and that he did not comply with it; that the pretended assignment of the rents from Townsend to Paden & Gridley was fraudulent and collusive as between the parties to it; and that the rents were not payable by the terms of the lease until April, 1897. The answer concludes with a prayer that it may be taken as a cross-bill and for a decree establishing appellant's rights, etc.

March 29, 1897, appellant filed a cross-bill alleging substantially the same facts as in his answer theretofore made a cross-bill, and praying for process of summons to Townsend, Paden and Gridley, as to whom the original bill had theretofore been dismissed.

March 31, 1897, a demurrer was filed by Gould to the cross-bill, and April 5, 1897, the demurrer was overruled. Summons was served on Paden & Gridley, and, July 7, 1887, Paden & Gridley filed a motion in writing to strike the cross-bill from the files, assigning reasons, etc. July 16, 1897, the court sustained the motion and struck the cross-bill from the files. The objection is made that the order striking the cross-bill from the files is not a final order or

decree from which an appeal lies. Appeals are unknown to the common law, and exist solely by virtue of the statute, and the statute allows appeals only "from all final judgments, orders and decrees." The bill of interpleader is still pending, and there has been no final adjudication of the issues, as between the parties whom the bill prays may interplead, namely, who, as between the parties named in the bill, is entitled to the rents. In addition to this, the cross-bill appears to have been unnecessary. Appellant having already answered, and made his answer a cross-bill, his rights could have been fully adjudicated on his answer if sufficient, and if he deemed the answer insufficient in any particular, he may apply to the court for leave to amend it, when his rights, as between him and Townsend, if the latter shall be made a party, can be fully adjudicated.

A cross-bill would seem to be unnecessary as between the defendants to a bill of interpleader. It is only necessary for them to set up their grounds of claim or right to the subject-matter of the bill, and the court can then adjudge who has the better right and, under the prayer of the bill, decree accordingly.

"If the judgment of the trial court leaves either party at liberty to again apply to that court for relief, the judgment is not final, and no appeal can be taken therefrom. Furthermore, there must be a final disposition of the whole case. If a case against several is finally disposed of as to one, leaving other proceedings to be had to determine the matters as to others, there is no such final judgment as the law contemplates as the basis of an appeal." 2 Shinn's Pl. and Pr., Sec. 1013.

Woodside v. Woodside, 21 Ill. 207, was error to reverse a judgment for costs rendered on a verdict on a feigned issue out of chancery. The suit was dismissed, the court saying: "This judgment was interlocutory only, from which an appeal or writ of error will not lie. There must be a final decision of the chancery cause before either party can have part of it reversed in this court; such a decision of the whole case as settled the rights of the parties respecting the

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subject-matter of the suit and which concludes them until reversed." See also the following cases: Thompson v. Follansbee, 55 Ill. 427; Gage v. Eich, 56 Ib. 297; Racine & M. Rd. Co. v. Farmers L. & T. Co., 70 Ib. 249; International Bank v. Jenkins, 109 Ib. 219; Farson v. Gorham, 117 Ib. 137; Sholty v. Sholty, 140 Ib. 81; Ben. Ass'n v. Farwell, 5 Ill. App. 240, citing numerous cases.

Counsel for appellant have cited cases in which appeals were entertained from orders dismissing cross-bills on the ground, apparently, that they were exceptions to the general rule, but we do not think that the present case falls within any well-recognized exception to the rule, nor can we perceive how any hardship can accrue to appellant from the dismissal of the cross-bill. The complainant can have no relief against appellant as the record now is. The bill is to compel appellant Townsend and others to litigate the question of the right to the rents of the leased premises, and the bill having been dismissed as to all except appellant, to which dismissal no one seems to have objected, there is no one left with whom, under the bill of interpleader, appellant can litigate that question. If appellant desires to litigate with Townsend respecting his alleged rights under his contract with him, he can do so by original bill. It is apparent that if the court ruled correctly in dismissing the bill against all the defendants except appellant (in reference to which we express no opinion), it should also have been dismissed as to appellant.

The question discussed by counsel, whether the striking the cross-bill from the files was proper practice, is not necessary to be considered, because, whether it was or not proper practice can not affect the question whether the order was or not appealable. We are of opinion that the order striking appellant's cross-bill from the files is not a final order and not appealable. The appeal, therefore, will be dismissed. Appeal dismissed.

Joseph A. Meath et al. v. William J. Watson.

1. **RECORDS—*Recitals in Decrees Conclusive.***—Where a decree recites that “the cause came on to be heard on the original bill, answers and replications thereto,” such recital is conclusive as to there having been a replication to the bill, and the certificate of the clerk to the transcript of the record can not be taken to contradict such recital.

2. **LANDLORD AND TENANT—*Receipt of Rent Not a Waiver of an Unauthorized Subletting.***—The fact that a lessor received the rent stipulated for in a lease can not be construed as a waiver of any right of objection to a subletting of the demised premises without the consent of the lessor.

3. **SAME—*Right of Lessee to Rents of Sublessee, After Forfeiture.***—After a lease is forfeited by a violation of its conditions in subletting without the consent of the lessor, the lessee can not be heard to complain of the disposition of the rents received from the sublessees by a receiver appointed by a decree for the purpose of collecting the same.

Bill of Interpleader, by a sublessee against the original lessor (landlord) and the sublessors (tenants), each claiming the rents. Cross-bill by the original lessor, trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Hearing and decree for the original lessor on the cross-bill. Appeal by the sublessors (tenants). Heard in this court at the October term, 1897. Affirmed. Opinion filed June 13, 1898.

STATEMENT.

On June 5, 1895, appellee leased certain premises in Chicago to appellants, for a term beginning June 15, 1895, and ending April 30, 1896, at a rental of \$1,450, payable \$100 monthly in advance for two and one-half months, and \$150 monthly in advance thereafter. The lease provided that premises were to be occupied for a piano salesroom, and for no other purpose whatever, and that appellants should not assign the lease or sublet, or permit the premises to be used for any other purpose than a piano salesroom, without the written consent of the appellee, and that in default of performance of these conditions appellee was authorized to terminate lease without notice and re-enter, etc. This provision is repeated and given further emphasis,

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as follows: "No assent to changes in, or waiver of, any part of this indenture, in spirit or letter, shall be deemed or taken as made, except the same be done in writing and indorsed herein by the lessor." Appellants took possession and occupied premises under the lease for about six weeks, until August 1, 1895. On July 30, 1895, appellants executed a lease to Mrs. E. J. Hopson, demising these same premises to Mrs. Hopson for the remainder of the term, viz., August 1, 1895, to April 30, 1896, to be used for a millinery store. It is undisputed that appellee knew nothing of the leasing by appellants to Mrs. Hopson until after the lease was executed. On August 1, 1895, appellants paid appellee \$100 rent for August, in advance, as by terms of the lease, and then informed the agent of appellee of the subletting to Mrs. Hopson. There is a conflict in the evidence as to whether there was an oral assent to the subletting at this time. It is not claimed that any assent in writing was ever given. From all the evidence the chancellor was fully warranted in a finding that there had been no assent either in writing or by parol.

Mrs. Hopson filed a bill of interpleader, setting up the facts as to leasing of premises by appellee to appellants, and by appellants to her, at a rental of \$200 per month; that appellee had notified her to surrender the premises, and had begun a suit against her of forcible detainer; that appellants had brought three suits against her for installments of rent, and obtained judgments thereon; that she was ready and willing to pay rent for the premises to whomever might be entitled thereto, and offered to pay same into court; prayed that appellants and appellee be required to interplead, and that it may be determined to whom the rent shall be paid; prayed that the proceedings at law be enjoined. A receiver was appointed to collect the rents accruing at rate of \$200 per month, and it was ordered that of such rents \$150 per month be paid to appellee pending the suit, and \$50 per month be held by the receiver subject to order of the court. Appellants and appellee were enjoined from prosecuting the suits at law.

Answers were filed to the original bill by both appellants and appellee. A cross-bill was filed by appellee by which he prayed for a decree canceling the lease and ordering the moneys in hands of receiver (viz., \$550, being the accrued amount of the balances of \$50 per month) to be paid to cross-complainant. Mrs. Hopson and appellants answered this cross-bill.

Upon final hearing the court entered a decree, substantially as follows :

Recites that case came on to be heard on bill, amendment thereto, answers of Meath and Watson, replications, the cross-bill of Watson, and the answers of Hopson and Meaths, and replications of cross-complainant. Finds that complainant is not entitled to relief prayed for in amendment to bill, but that bill of interpleader was properly filed; that all of the material allegations in cross-bill have been proved; and also the material allegations in answer of Watson to original bill have been proved; that the said Meaths leased the property described for a term beginning June 15, 1895, and ending April 30, 1896, for stipulated rental as charged in bill; that it was a condition of the lease that Meath should not assign or sublease, or permit premises to be used, except for a piano salesroom, without the written consent of Watson; and that on default of performance of that condition the lessor was authorized to terminate said lease without notice and re-enter the premises; that on August 1st said lessees paid \$100 as the rent for the month of August, 1895; and that on July 30th, without notice to Watson or his agent, and without consent of Watson or his agents, lessees executed and delivered a lease to Hopson for the premises, to be used as a millinery store, for a term beginning August 1, 1895, and ending April 30, 1896, at a stated rental of \$1,800; and that the Meaths delivered possession of said premises on or about August 1, 1895, and Hopson remained in possession till April 30, 1896; that immediately on taking possession Hopson was notified that her lease had been made in violation of the Meath lease, and said J. A. Meath verbally

Meath v. Watson.

notified to same effect; that August 24th Watson served a written notice on Meath and Hopson that he had elected to determine said lease in consequence of said default, and said Meaths and Hopson were notified to surrender possession; that said several acts constitute a forfeiture of lease of Watson to Meaths; recites proceedings at law as in bill, and that October 30, 1895, an injunction was issued restraining Meaths and Watson from further prosecution of said suits, and directing payment to a receiver of rents, etc.; that receiver had collected \$1,800 and had paid to Watson \$1,250, leaving in his hands \$550; allows receiver \$100 for his services and decrees that Watson is entitled to remainder, except \$100, which the receiver is directed to pay to Meaths—each party to pay his own costs.

RUFUS COPE and W. LEMMA, attorneys for appellants.

JOSEPH H. FITCH, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellants that the answer of appellants to the original bill should have been taken as true for want of any replication thereto. The decree, however, recites that the cause came on to be heard on original bill, answers and replications thereto, and upon cross-bill, answers and replications thereto. These recitals of the decree are conclusive as to there having been replications, and the certificate of the clerk can not be taken to contradict this recital. *Brown v. Miner*, 128 Ill. 148.

Counsel also contend that the receipt of the check for \$100 in payment of August rent upon the 1st day of August, when appellee's agent was informed by appellants that they had subleased to Mrs. Hopson, was in effect a waiver of any right of objection to such subletting.

We can see no merit in this contention. Appellee had an undoubted right to receive the rent stipulated for in the lease, while appellants had no right to sublet without consent first obtained of appellee. That the taking of the rent

paid in accord with the terms of the lease should operate to ratify a subleasing, which was in breach of the covenants of the lease, is wholly untenable.

By their action in surrendering the possession of the premises to another for the carrying on of a business other than that of a piano salesroom, and by subleasing to Mrs. Hopson without the assent of appellee, all rights of appellants under the lease were forfeited at the time the notice was served by appellee. They, therefore, can not be heard to complain of the disposition of the money in the receiver's hands which was ordered by the decree.

The decree is affirmed.

Ettlinger Printing Co. v. E. W. Copelin.

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1. **ABSTRACTS—*Exceptions Must Appear.***—Where the abstract does not show that any exception was taken to the finding or judgment of the trial court, the Appellate Court is not required to search the record to find whether or not exceptions have been preserved. Everything upon which error is assigned should appear in the abstract.

2. **APPELLATE COURT PRACTICE—*Where Exceptions Are Not Preserved, Inquiring as to Sufficiency of the Evidence.***—Where exceptions are not preserved to the finding of the trial court, the Appellate Court can not inquire into the sufficiency of the evidence to support the judgment.

3. **BILL OF EXCEPTIONS—*Must Show Exceptions Taken to the Findings of the Trial Court—Recitals in the Judgment Not Sufficient.***—The bill of exceptions must show that an exception was taken to the finding of the trial court. The statement by the clerk, after reciting the rendition of the judgment and award of executions, "whereupon the defendant, having entered its exceptions herein, prayed an appeal from the judgment," etc., is not sufficient.

Assumpsit, for goods sold and delivered. Trial in the Superior Court of Cook County without a jury. The Hon. WILLIAM G. EWING, Judge, presiding. Finding and judgment for plaintiff. Defendant appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 13, 1898.

LEVI A. ELIEL, attorney for appellant.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for appellee, stated that the case was tried by the court below without a jury, and contended that, as no propositions of law were presented by either party, this court is bound to presume that the trial court correctly decided all questions of law involved. When the court found the issues for the plaintiff, no exception was taken by appellant to the finding or to the judgment entered upon it. The propriety of that finding, therefore, is not now open to review, and can not be questioned upon this appeal when no exception was taken in the lower court.

The rule is thus stated in *Everett v. Collinsville Zinc Co.*, 41 Ill. App. 552:

“The court entered judgment for the defendant for costs. The bill of exceptions contains no finding by the court, nor any exceptions to the finding or judgment of the court. No propositions of law to be held by the court were presented. No question arises upon the pleadings; but the rulings of the court during the progress of the trial, and rendering judgment for defendant and not for plaintiff, are the only errors assigned or relied upon to reverse this judgment.

In the condition we find the record, we are precluded from considering and passing upon any of the errors assigned, and must affirm the judgment. In a trial by the court without a jury, where the bill of exceptions fails to set out the findings and judgment of the court, and to show they were properly excepted to, no question arising upon such findings and judgment can be considered by the Appellate Court.”

MR. JUSTICE WINDES delivered the opinion of the court.

This suit was brought by appellee in the Superior Court of Cook County, to recover from appellant for goods alleged to have been sold and delivered by appellee to appellant. It was submitted to the court without a jury, and the trial resulted in a finding and judgment for appellee of \$354.58. The abstract does not show that any exception was taken

to the finding or judgment of the trial court. We are not required to search the record to find whether an exception was preserved. Everything on which error is assigned should appear in the abstract. *Chapman v. Chapman*, 129 Ill. 386; *City of Roodhouse v. Christian*, 158 Ill. 137; *Gibler v. City of Mattoon*, 167 Ill. 18; *Dickinson v. Gray*, 72 Ill. App. 55.

No exception being preserved to the finding or judgment of the court, we can not inquire into the sufficiency of the evidence to support the judgment. *Fireman's Ins. Co. v. Peck*, 126 Ill. 493, and cases cited; *Ill. C. R. R. Co. v. O'Keefe*, 154 Ill. 511.

But the bill of exceptions contained in the transcript of the record fails to show that any exception was taken to the finding of the court. The transcript of the record made by the clerk shows a finding by the court, motion for a new trial overruled, rendition of judgment and award of execution, and the further statement, "whereupon the defendant, having entered its exceptions herein, prays an appeal from the judgment," etc. Even if these facts were properly shown by the abstract, still they are not sufficient to justify a consideration of the evidence as to its sufficiency to sustain the finding. The bill of exceptions must show that an exception was taken to the finding of the trial court.

In *Fireman's Ins. Co. v. Peck*, 126 Ill. 494, speaking of a record like this, and holding the rule to be as above stated, the Supreme Court said: "We are strenuously urged by counsel for appellant, in very able and elaborate briefs and arguments, to change the rule so long established by the decisions of this court, and hold that if the proper motions and exceptions appear in the judgment order or order allowing the appeal, as made up by the clerk and certified by him, then it is not essential they should appear in the bill of exceptions signed and sealed by the judge. Were the question an open one we might be inclined so to hold; but the rule now objected to is a settled rule of practice in this State, and has been announced and followed for so long a

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time and in so many cases that it ought not to be departed from, and we must therefore decline to enter into a discussion as to its propriety. The rule as held is familiar to the profession, and is easily understood, and there is no difficulty or hardship in conforming to its requirements."

We have examined the record as to alleged errors of the court in admitting and excluding evidence, and find no reversible error in its rulings in that regard.

The judgment is affirmed.

Albert Ellinger v. Waldemar Caspary.

1. **ABSTRACTS**—*Cases Improperly on the Short Cause Calendar.*—Where there is nothing in the abstract to show whether or not a case was properly placed upon the short cause calendar, the Appellate Court will not search the record for information on the question.

2. **PRESUMPTIONS**—*As to the Regularity of Proceedings.*—In the absence of anything in the record showing to the contrary, the court having jurisdiction of the person and subject-matter, it will be presumed that its proceedings were regular and in conformity to the law.

3. **WAIVER**—*Going to Trial Without the Issues Made Up.*—By going to trial without making the objection that the issues are not complete, a party waives the right to insist upon such want of issues as error in the Appellate Court.

4. **VARIANCE**—*Pleadings and Proof.*—Where the declaration sets out a judgment against a party, and the proof shows a judgment in another State against him on personal service, and against another party on service by publication, it is sufficient to justify a finding against the defendant.

Debt, on foreign judgment. Trial in the Superior Court of Cook County, without a jury; the Hon. WILLIAM G. EWING, Judge, presiding. Finding for plaintiff. Defendant appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed June 18, 1898.

STATEMENT OF FACTS.

Appellee brought an action of debt on a foreign judgment against appellant and William J. Barth, in the Superior Court of Cook County, and after the declaration was filed

the suit was discontinued as to Barth. A demurrer having been interposed by appellant, it was confessed and an amended declaration filed, which alleged, in substance, that plaintiff recovered a judgment in the Supreme Court of the State of New York for the City and County of New York, on February 9, 1897, against appellee, for \$1,144.75 damages, and also costs, \$189.90; that said judgment still remains in full force and has not been paid.

To this declaration appellant filed seven pleas, to the first of which a demurrer was sustained, and overruled as to the third and fourth. The abstract shows affirmatively that replications were filed to the second, fourth, fifth, sixth and seventh pleas, and that defendant demurred to "replications to each of said pleas." Whether that includes a demurrer to a replication to the third plea we can not tell, but the record shows that appellee rejoined to a replication of plaintiff to the third plea and all the other pleas except the first, which was disposed of on demurrer. When the several pleadings were filed does not appear, but it does appear that on July 14, 1897, the cause was tried by the court on the short cause calendar, a jury waived by agreement, issues found for plaintiff, debt \$1,144.75, damages \$207.58 entire; motions for a new trial and in arrest of judgment were overruled, and judgment rendered on the finding. How or when the case was placed on the short cause calendar does not appear.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellee.

MR. JUSTICE WINDES, after making the above statement, delivered the opinion of the court.

It is claimed, first, that the case was improperly tried on the short cause calendar; second, that the case was tried against appellant's objection that the issues were not made up; and third, that there is a variance between the declaration and the proof of the judgment declared upon.

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As to the first contention, we are unable to tell whether there was error or not. There is nothing whatever in the abstract to tell us when or by what means the case was placed upon the short cause calendar. We are not required to look in the record for this information, nor will we search the record for what should be shown by the abstract. *Gibler v. City of Mattoon*, 167 Ill. 18.

In the absence of anything in the record showing to the contrary, the court having jurisdiction of the person and subject-matter, it will be presumed that its proceedings were regular and in conformity to the law. As to the second contention, so far as we can tell from the abstract, the case was at issue when the trial was had. Besides, it appears that by agreement between the attorneys a jury was waived, cause submitted to the court, the defendant reserving the objections and exceptions theretofore raised and made to the trial of said cause upon the short cause calendar. The objections theretofore raised in that regard were that the cause was not at issue when the same was placed on the short cause calendar, and was not at issue when the notice to place the same upon the short cause calendar was served.

While it may have been true, though it does not so appear, that the issues were not complete when the notice was served, nor when the case was placed upon the short cause calendar, it may also have been true that when the objection was made the issues were fully made up. In any event, it fails to appear that appellant made any objection to the trial because the issues were not complete, and he can not now insist upon the objection when it was not made in the trial court. By going to trial without making the objection that the issues were not complete, he waived any error in that regard.

The third contention is not tenable. The amended declaration sets up a judgment against appellant alone. The proof shows a judgment against appellant on personal service, and a judgment on service by publication against William J. Barth, and was sufficient to justify the judg-

ment against appellant alone. It was no judgment as to Barth on which there could be a recovery against him, but was a judgment against appellant. *Smith v. Smith*, 17 Ill. 482; *Sim v. Frank*, 25 Ill. 127; *Vail v. Iglehart*, 69 Ill. 335.

We can not say that it appears that this appeal was prosecuted for delay, as was held in *Ry. Co. v. Nash*, 166 Ill. 528, where it appeared that the identical question presented had been decided by the Supreme Court against the same appellant, and represented by the same counsel before that appeal was taken, and therefore we will not allow statutory damages against appellant.

The judgment is affirmed.

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James H. Gilbert v. Nathan Gallup.

1. **SHERIFFS—*Reasonable Diligence as to Executions.***—A sheriff having an execution in his hands against the property of a defendant, is only bound to exercise reasonable diligence to discover property where-with to satisfy the same.

2. **SAME—*True Measure of Liability.***—The true measure of a sheriff's liability for negligently failing to levy on property of the defendant in an execution, is the amount which the property would have brought if sold at public sale to the highest and best bidder.

3. **WITNESS—*When He Disqualifies Himself.***—A witness who, when called upon to testify upon the question of market values during a certain period, states that it is impossible for him to state what such market values were, disqualifies himself from testifying.

Action on the Case, against a sheriff for alleged negligence in failing to levy an execution. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment for plaintiff. Defendant appeals. Heard in this court at the October term, 1897. Reversed and remanded. Opinion filed June 13, 1898.

E. R. BLISS, attorney for appellant.

FRANK BURKE DRAPER, attorney for appellee.

Gilbert v. Gallup.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for the sum of \$1,000 in favor of appellee and against appellant, rendered in an action on the case against the appellant, as sheriff of Cook county, for alleged negligence in failing to levy an execution and alias execution issued on a certain judgment for the sum of \$2,750 and costs, in a suit in which appellee was plaintiff, and Eugene Kauffman and M. H. Kauffman, his wife, were defendants.

Appellant, by his counsel, objects that improper evidence was admitted in behalf of the appellee; that there was no proper evidence of damage; that certain of the instructions are erroneous, and that the evidence fails to show a want of due diligence on the part of appellant. Appellee introduced evidence tending to show that during the lifetime of the execution, the defendants had personal property subject to execution, and called witnesses to prove the value of the property.

In the deposition of Eugene Kauffman, read in evidence, the following occurs:

Q. "Now, I will ask you particularly as to the value of those articles. What was that suit of parlor furniture worth in the market in Chicago at that time?" A. "It would be impossible for me to state what the value of that furniture would have been in the market in Chicago at that time."

Q. "What, in your opinion, was it worth at that time?"

The last question was objected to on the ground that the witness was not qualified to testify as to value, etc., but the court overruled the objection and appellant excepted, and the witness was allowed to proceed and testify to the value of a long list of articles of personal property, which he had previously stated were owned and possessed by the defendants in the executions in Chicago, during the lifetime of the executions, which testimony, at the close of the examination in chief of the witness, appellant's counsel again objected to and moved to exclude, which motion the court overruled. Appellant's objections were noted in the deposition.

If it was competent to prove value at all, the value to be proved was the value in the market in Chicago, where the property was situated while the execution was in the hands of the sheriff, and when the witness said that it was impossible for him to state what such market value was, he, in our opinion, disqualified himself. We are unable to perceive how the jury could be enlightened as to the market value of the property by the opinion of a witness who not only failed to say that he believed he knew such value, but stated, in substance, that he did not know it. The same witness was permitted, against the objection of appellant's counsel, to testify as to the value of pictures, jewelry and a lot of stuff which he called bric-a-brac, without any evidence whatever tending to show that he was qualified to so testify.

Counsel for appellant further objects that evidence of the market value of the property was not competent, basing this objection on the legal proposition that when the sheriff negligently fails to levy on property of the defendant in an execution, the true measure of his liability is the amount which the property would have brought if sold at public sale to the highest and best bidder. The court so instructed the jury, and such we understand to be the law. *Murfree on Sheriffs*, Sec. 976; *French et al. v. Snyder*, 30 Ill. 339; *Harris et al. v. Murfree*, 54 Ala. 161.

Sutherland, in his work on Damages (Vol. 1, p. 246), says: "In actions for neglect of duty or misconduct of ministerial officers, affecting parties entitled to call on them for services, or for whom such officers are required by law to perform duties, as well as in like actions by employers against agents and attorneys, the general rule is that the injured party is entitled to compensation commensurate with his actual loss."

In *French v. Snyder*, *supra*, the court say that the right to recover damages is "commensurate only with the injury." In the same case, the court distinguished between fair market value as between a vendor not forced to sell, and a purchaser, and what property will bring at a forced sale, and

says of a sheriff: "He must take into his possession an amount of property sufficient when sold, in all reasonable probability, making a proper allowance for the sacrifice usually incident to forced sales, to bring a sum that will satisfy the execution and costs." The same distinction is recognized in other cases.

While we are not prepared to hold that proof of market value in such cases is incompetent, neither are we prepared to hold that it is sufficient. It might and, as we think, should be followed by evidence tending to show what the property would bring at a forced sale, or how much of its fair cash value in the market would be likely to be sacrificed at such a sale. In the present case, the jury was substantially instructed that if they found for the plaintiff, they should, in assessing the plaintiff's damages, consider what the property would bring if subjected to a forced sale, and there being no evidence of what it would probably bring in such case, the jury were left, in assessing damages, to a mere guess. We can perceive no practical difficulty in procuring witnesses experienced in public sales of personal property, who, on being informed of the kind of property in question and its condition, can testify intelligently as to the probable loss of value if the property were exposed to a forced sale.

The giving of the following instruction is assigned as error:

"You are instructed that by ordinary diligence, as used in these instructions, is meant that degree of care and attention which, under the same circumstances, a man of ordinary prudence and discretion would ordinarily use in reference to the particular matter in question if it were his own affair."

This can only mean that "ordinary diligence," which the law required of the sheriff, is such as a man of ordinary prudence and discretion would exercise, if he were the plaintiff in the execution. A man of ordinary prudence might, and ordinarily does, exercise greater diligence when his own pecuniary interest is at stake, than he would exercise, or be required to exercise, if he were acting as an impartial

and personally disinterested public officer. A man of ordinary prudence and discretion might, if he were plaintiff in the suit, spend money in endeavoring to ascertain whether the defendant had property; he might employ a detective to dog his steps and pry into his affairs; he might consult the tax lists to ascertain if he had assessable property and how much; none of which things is the sheriff required to do. The sheriff is not required by law to act as if he were plaintiff in the suit. On the contrary, the statute recognizes that one thus interested might be oppressively zealous, and expressly provides that when the sheriff, or his deputy, is a party to a case, or interested therein, or is of kin, or partial to, or prejudiced against either party, the process shall be directed to the coroner and the latter shall perform the duties of the sheriff in the case. 1 S. & C. Stat. 980, Sec. 10.

A sheriff is only bound to exercise reasonable diligence. *Hargrave v. Penrod*, Breese, 401; *Dunlap v. Berry*, 4 Scam. 327; *Crosby v. Hungerford*, 59 Ia. 712.

The question whether the appellant had exercised reasonable diligence was the vital question in the case; the evidence was conflicting on that question, and the jury should have been accurately instructed. The giving of the sixth instruction is reversible error. Appellant's counsel also complains of the giving of the first, eleventh and twelfth instructions. It is not proper practice to leave to be passed on by the jury, matters apparent of record, such as a judgment, and the issuing and return of an execution, as was done by the first instruction. The court may, if it seems necessary, inform the jury that such a judgment was recovered, such an execution was issued and returned, because these are matters to be decided by the court and not by the jury; but we can not perceive how appellant could have been prejudiced by the instructions. Instructions eleven and twelve were perhaps unnecessary, but we would not regard the giving of them as reversible error.

The judgment will be reversed and the cause remanded.

Stopp v. Wilt.

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177s 620**Edward J. Stopp v. Charles T. Wilt, Jr., and Northwestern Elevated R. R. Co.**

1. **EMINENT DOMAIN—When the Power is Exercised—Mortgagee's Lien.**—When the power of eminent domain is exercised, the money paid stands in place of the land condemned, and a mortgagee's lien attaches to the same; and the mortgagee is entitled to have such money, in place of the land, applied to the payment of his indebtedness.

2. **SAME—Where the Owner Disposes of his Property and Becomes Mortgagee—Assignment of Claims.**—Where the owner of property conveys the same to another, takes a mortgage thereon to secure the payment of the purchase money, and afterward relinquishes all his claims, including that under his mortgage, to the fund which stands in lieu of the premises taken, he will not be entitled to have the fund applied to the payment of the mortgage debt.

Bill of Interpleader.—Trial in the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Hearing and decree; appeal by the unsuccessful party. Heard in this court at the March term, 1898. Affirmed in part and reversed in part. Opinion filed May 26, 1898.

The bill filed in the Superior Court was in the nature of a bill of interpleader, seeking for a determination of the rights of appellant Stopp and appellee Wilt to a condemnation award of \$2,000, which had been paid, \$300 thereof to Wilt and \$1,700 thereof to the county treasurer, by the complainant, the Northwestern Elevated Railroad Company. The bill also prayed for the release of a mortgage upon the property taken in the condemnation proceeding.

There was at the same time a motion pending by Wilt, in the condemnation suit in the same court, for an order on the county treasurer to pay over said money to him.

Sundry answers and demurrers were filed to the bill, and, in order to arrive at a speedy determination of the matter, jurisdiction was given by stipulation to the chancellor in the interpleader suit to determine the issues without written pleadings, and to enter whatever decree or order he saw fit in either or both of said suits.

The agreed facts were as follows: On December 24,

1895, the Northwestern Elevated Railroad Company filed a petition in the Superior Court for the condemnation of a triangular piece off of the rear of the property in controversy, and made as defendants appellant and his wife, and Wilt and others.

Stopp was then the owner of the fee and Wilt the tenant in possession.

On March 30, 1896, after the beginning of the condemnation suit, but before trial, Wilt and Stopp made a contract, by which Wilt should purchase the property in controversy, paying for it in part by cash, part by exchange of other land, and balance by mortgage of \$8,000. In this original contract for the sale and exchange of property, Stopp agreed to give Wilt all the assistance in his power in the trial of the condemnation suit. This contract was consummated on April 8, 1896, by the execution of a deed from Stopp and wife to Charles T. Wilt, Jr., and mortgage from Charles T. Wilt, Jr., and wife to Stopp. After the execution of both deed and mortgage a definite agreement was entered into in regard to the condemnation suit, in effect as follows: Reciting that parties entered into a contract for the purchase, sale and exchange of said property on March 30, 1896; that said contract has this day been consummated by the delivery of deeds, notes and mortgages therein referred to; reciting also the bringing of the condemnation suit; reciting that it was a part of the understanding and agreement between the parties that all the rights, causes of action and remedies which the said Stopp might have or be entitled to against said railroad company in the above entitled suit, or elsewhere or otherwise, should as a part of said sale and transfer pass to the said Wilt; that in consideration of the premises said Stopp does hereby set over, assign and transfer to the said Wilt, Jr., all his rights of action, causes of action, claims and demands of every sort whatsoever which he may now have against said Northwestern Elevated Railroad Company, or which he had on the 25th day of July, 1895, or the 30th day of March, 1896, by reason of the condemnation suit aforesaid, or which he

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may be hereafter entitled to as compensation for the taking of a portion of said premises by condemnation or otherwise for the construction of said railroad, and for damages to the remainder of said premises not taken by reason of said construction; that the said Wilt, Jr., shall have the privilege of defending the condemnation suit aforesaid in the name of said Stopp, if he shall deem it advisable, and that whatever verdict or judgment is obtained in favor of said Stopp in the above entitled suit is hereby assigned and transferred to the said Wilt, Jr., and the said Stopp hereby agrees to execute on demand at any time hereafter further, more formal and sufficient assignments of said verdict or judgment when obtained, and the said Stopp does also authorize the said Wilt, Jr., to negotiate such settlement of said condemnation suit as he may see fit, and doth agree to ratify and confirm the same, and to execute such papers as are necessary to carry such settlement into effect.

On September 29, 1896, after the execution of all the foregoing contracts, a trial was had of the condemnation suit, on which trial it was stipulated and agreed that the interests of Wilt and Stopp, the tenant and the reversioner should be tried together, and that one single judgment should be rendered to cover all the interests in the lots in question.

On September 29, 1896, a judgment was rendered in favor of Stopp and Wilt for \$725.90 compensation for the premises taken, together with the improvements thereon, and \$1,274.10 for damages to the part not taken, and the improvements thereon. The part taken was a strip off the rear of said lots, which was occupied by a stable, and it was claimed in the submitted cause upon the bill of interpleader that the taking of said strip necessitated the destruction of said stable and the reconstruction thereof in order to furnish the property with stable and other facilities as before the taking. The necessary expenses of reconstruction were found by the chancellor in the interpleader suit to exceed the total amount which Wilt would realize from said award after deducting the costs and legal expenses of recovering and collecting said award.

On December 22, 1896, the railroad company paid Wilt \$300 on account of the judgment. May 6, 1897, the company paid the balance of \$1,700 to the county treasurer. After the money had been paid into the county treasury, controversy arose between Stopp and Wilt as to the ownership thereof; Stopp claiming that the money should be paid to him, because the condemnation judgment had reduced the value of his security; Wilt claiming that the money was his by virtue of the numerous assignments made by Stopp of all his rights and interests involved in said condemnation suit, and claiming also that it was necessary to use said money in the reconstruction of the premises, so as to make the same available and valuable to him. To settle this controversy this bill of interpleader was filed.

Appellee Wilt, tendered a bond on the hearing, to secure to Stopp that said money, less expenses, should all be used in the reconstruction of the premises, and in restoring the same to as valuable condition as before the condemnation suit. On these facts the chancellor entered a decree in favor of Wilt in the interpleader suit, directing the fund in dispute to be paid to him, and also directing that appellant release to appellee, the Northwestern Elevated Ry. Co., the mortgage upon the property taken in the condemnation suit. From this decree the appeal here is prosecuted.

EDW. U. FLIEHMANN, attorney for appellant.

EDGAR BRONSON TOLMAN, attorney for appellees Charles T. Wilt and Charles T. Wilt, Jr.

L. W. PEROE and B. C. STIDGER, attorneys for appellee Northwestern Elevated Railroad Company.

MR. JUSTICE SEARS delivered the opinion of the court.

The questions presented are as to the propriety of the decree, first, in ordering the amount awarded in the condemnation proceeding to be paid to appellee Wilt, Jr., and, secondly, in ordering that appellant, Stopp, release the

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mortgage upon the property taken in the condemnation suit by appellee, the Northwestern Elevated Railroad Company.

The first question depends for answer upon the effect which is to be given to the contract entered into between appellant and appellee Wilt, Jr., after the execution and delivery of the deed conveying the premises in question and mortgage upon same to secure part purchase money.

We can see no reason for construing this contract as other than a plain undertaking by appellant, Stopp, in consideration of the purchase of the property by Wilt, Jr., to relinquish to Wilt, Jr., all right to whatever moneys might be awarded in the condemnation proceeding, either for part taken, or as damages to the remainder of property in question. To give effect to this agreement the chancellor could not have decreed otherwise than was done as to the disposition of the money in the hands of the county treasurer.

It is true, as contended, that when the power of eminent domain is exercised, the fund paid stands in place of the land condemned, and a mortgagee's lien attaches to the fund, and the mortgagee is entitled to have the money in place of the land applied to the payment of his claim. *Calumet River Ry. Co. v. Brown*, 136 Ill. 322.

But here appellant, after he had ceased to be owner and had become a mortgagee, relinquished to Wilt, Jr., all claim, including as well that under his mortgage as any other, to the fund which stood in lieu of the mortgaged premises taken.

The giving of a bond to secure the disposition of this money in rebuilding, etc., was perhaps equitable and not improper to have been considered by the court under the informal submission of the controversy; but it was not necessary to support the decree awarding the disputed fund to appellee, Wilt, Jr.

The remaining question is as to that part of the decree which orders appellant to release the mortgage in question as to the part of the property taken by appellee, the railroad

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company. We see no ground for such relief, nor is there any need of relief. The condemnation suit was pending as against Stopp, the owner, before the contract of sale was entered into by him, and before the mortgage was executed, which was made to carry out such contract. Appellee, the Northwestern Elevated R. R. Co., obtained, by judgment in the condemnation suit, all that it is entitled to as to this property. Under the law of eminent domain, it obtains no right to a deed by owner or release by mortgagee. The mortgagee, Stopp, having been a party to the condemnation suit, the effect of the judgment there was to remove the lien of the mortgage from the land taken to the fund awarded.

The decree is reversed as to so much thereof as directs the release of the mortgage to be executed, and is in all other respects affirmed. Reversed in part and affirmed in part.

**Chicago City Ry. Co. v. Montgomery Ward & Co. and
A. Montgomery Ward.**

1. **INJUNCTIONS—Without Notice.**—An injunction without notice should not be allowed except in extreme cases, and as a general rule it may be avoided, where there is apprehension on the part of the complainant that he may be deprived of the benefits of the injunction he seeks by some action of the defendant after notice is served and before the application can be heard, by giving notice of immediate application to the chancellor; where, if there can not be a hearing at once, the chancellor may require matters to remain in *statu quo* pending the hearing, by a stay order, or issue the injunction *instanter*, and give the defendant a hearing upon a motion to dissolve.

2. **PLEADINGS—Must State Facts.**—The pleader must state in his pleadings facts, not conclusions.

3. **SAME—Allegations as to Decisions in Other Cases.**—Statements as to what has been decided in another case more properly find their place in the brief and argument than in the pleadings of counsel.

4. **DEDICATION—A Question of Intention—Pleadings.**—Dedication is a question of intention of the dedicator, who must be the owner in fee, and is not complete until accepted; and where a dedication is claimed, the facts constituting it should be set out in the bill.

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Chicago City Ry. Co. v. Montgomery Ward & Co.

Order, granting an injunction without notice, made by the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Appeal by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed May 26, 1898.

STATEMENT OF FACTS.

Appellees as owners in fee of certain lots in block 15, Fort Dearborn addition to Chicago, Cook county, Illinois, of a leasehold estate in lot 7 in said block, expiring May 31, 1940, all of the lots fronting on Michigan avenue and Madison street, Chicago, and also claiming to own the buildings on said lots which they occupy in the conduct of their business as importers, jobbers and manufacturers of general merchandise, and which buildings and business they say are of great value, filed a bill in the Superior Court of Cook County against appellant. The bill alleges:

“Fourth. That the said lots of your orators front east upon Michigan avenue and Lake Park, in said Fort Dearborn addition to Chicago, and that said Michigan avenue in said Fort Dearborn addition between Madison and Randolph streets, in said city of Chicago, is a part and parcel of said Lake Park, which Lake Park, between the east line of the said lots of your orators and Lake Michigan, was dedicated to use of the public by the Government of the United States, ‘not to be occupied with buildings of any description,’ and that the original plat of said Fort Dearborn addition, made by the Secretary of War of the United States, in accordance with which the said lots of your orators were sold, dedicated the said land east of the said lots of your orators clear to the waters of Lake Michigan, as public ground, not to be occupied with buildings of any description.

“Fifth. That the said land known as Michigan avenue and Lake Park, lying east of the said lots of your orators, and extending from Madison street on the south to Randolph street on the north, has heretofore, by the Supreme Court of this State, in its decision rendered on the 8th day of November, 1897, in the suit of City of Chicago v. Ward.

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et al., been held and declared to be dedicated to the public for park purposes and for park purposes only, and that the said city of Chicago holds the title thereto in trust only for the purposes aforesaid.

“Sixth. That the Supreme Court of this State in the said decision, held that no encroachments should be made upon the said land by any railroad company, nor should any such encroachment be allowed by the city council of the said city of Chicago; and also held that any owner of property abutting upon said Michigan avenue should have the right to enjoin any such encroachments.

“Seventh. That the said Chicago City Railway Company owns and operates certain lines of street railway in the said city of Chicago, and that a portion of its street railway extends from Wabash avenue and said Madison street (a point one block west of the corner of said Michigan avenue and Madison street) east on said Madison to said Michigan avenue; thence north on said Michigan avenue two blocks to said Randolph street; thence west on said Randolph street one block to said Wabash avenue, and thence south on said Wabash avenue past the said intersection of Madison street and Wabash avenue to the southern portion of said city of Chicago; said line of street railway constituting said loop, being operated by said railway company by means of a motive power known and called cable power, which is a continuous or endless cable run beneath the surface of said streets, used for the purpose of propelling the cars of said railway company over said loop; and that the said railway company has thus operated its cars over said loop for a number of years past.

“Eighth. That the said Chicago City Railway Company, through its officers, agents, servants and employes, purposes and threatens to change the motive power upon said loop and upon said Michigan avenue in front of said property of your orators to electric power, and to utilize said electric power by the means of what is known as the overhead trolley system; and for that purpose and to that end has strewn along said Michigan avenue, between said Madison and Ran-

dolph streets numerous iron or steel poles and large quantities of sand, gravel and other materials, for the purpose of erecting said trolley system upon said Michigan avenue.

“Ninth. That the said threatened use of said Michigan avenue between said Madison and Randolph streets, is in direct violation of the uses and purposes for which said street and land was dedicated as aforesaid, and is in violation of the rights of your orators as abutting property owners as aforesaid, and jeopardizes the easement of your orators over said street and the land east thereof, and will be an irreparable injury to the property rights of your orators as aforesaid.

“Tenth. That the said Chicago City Railway Company pretends to have right and license to erect the said trolley poles and electric system upon said Michigan avenue by reason of a certain permit issued to it by certain officials of the city of Chicago; but your orators charge the fact to be that the said city of Chicago, nor any of its officers, have any power or authority to license the use of said street for said purposes, and that the said city of Chicago has not the power under the trust charged upon it in connection with said land east of the lots of your orators, to authorize or permit the use thereof for the purpose of the erection of trolley poles and electric systems of motive power for the propulsion of street cars; and that any such use of said land is in direct violation of the rights and easements of your orators in said land.”

It further alleges, in substance, that there is no public need or necessity for the construction and operation of said electric or trolley system upon Michigan avenue between said streets, and that the right of appellees “in the premises will be unduly prejudiced if the injunction in this case hereinafter prayed is not issued immediately and without notice to the defendant, and that said defendant, unless immediately restrained, will construct said overhead trolley system in said street.” No other facts are alleged from which it can be told that there was a necessity for an injunction without notice, and notice was not served. The

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bill prays an injunction restraining defendant, its officers, etc., from erecting, constructing or operating, or causing to be erected, constructed or operated, an overhead trolley or electric system of motive power for its railroad upon that part of Michigan avenue between Randolph and Madison streets. An injunction was issued according to the prayer of the bill, from which order this appeal was taken.

JESSE R. BARTON and E. R. BLISS, attorneys for appellant.

GEORGE P. MERRICK, solicitor for appellees; JOHN H. HAMLINE, of counsel.

MR. JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

This court, in *Nusbaum v. Locke*, 53 Ill. App. 244, speaking of the issuance of an injunction without notice, said "the well settled rule is that notice of the application must be given unless it is clearly necessary to act without notice," and held that the facts upon which the pleader's conclusion was based, that there was imminent danger to complainant, should be stated, so that the court could see that the apprehension was well founded. To the same effect are *Brough v. Schanzenbach*, 59 Ill. App. 409; *Becker v. Defebaugh*, 66 Id. 504, and No. 7665, *Henderson v. Flanagan*, of this court, not reported.

In the *Defebaugh* case the court said: "The appellee was and is not entitled to any consideration of his application unless he first comply with the statute, by giving notice of making it 'appear' to the court, judge or master, to whom the application is made, by a sworn statement of facts, either in the bill, accompanying affidavits, or both, from which the conclusion can be drawn that the rights of the complainant will be unduly prejudiced," etc.

The injunction here, without notice, being based upon the allegations of the sworn bill alone, was, we are inclined to think, improper, because no sufficient facts are alleged

from which it can be said that it was clearly necessary, in order to prevent undue prejudice to appellees, or any serious injury to them.

It does not appear how soon the poles could have been erected and the wires strung, nor if that were done, after notice given and before the court could hear the application, what would be the injury to appellees. The extraordinary remedy of injunction without notice should not be allowed, except in extreme cases, and as a general rule may be avoided where there is apprehension on the part of a complainant that he may be deprived of the benefits of the injunction he seeks by some action of defendant after notice is served and before the application can be heard, by giving notice of an immediate application to the chancellor, when, if there can not be a hearing at once, the chancellor may require matters to remain in *statu quo* pending the hearing, by a stay order, or issue the injunction instanter, and give defendant a hearing upon motion to dissolve. There appears to us no reason why such a course could not have been pursued in this case.

The case being doubtful as to the matter of notice, we do not decide that point, and proceed to the merits of the bill, which we think insufficient to justify an injunction.

It was conceded by counsel for appellees, in oral argument, that if Michigan avenue is a street, then the bill can not be maintained; but they say that the theory of the bill that Michigan avenue is a part of Lake Park, and that under the decisions of the Supreme Court in *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540, and *City of Chicago v. Ward*, 169 Ill. 392, the city of Chicago held the park in trust for the benefit of appellees, as owners of lots abutting upon it, and had no power to grant appellant the right to use Michigan avenue, it being a part of the park, for the purpose of operating a railway thereon by an electric overhead trolley system.

It is elementary, and no authority need be cited to sustain the proposition, that the pleader must state in his pleadings facts, not conclusions.

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Appellees claim their right to an injunction in this case, because they say a trust in Lake Park (which includes Michigan avenue) was created for their benefit, of which the city of Chicago is trustee.

They allege that their lots front east on Michigan avenue and Lake Park, in Fort Dearborn addition to Chicago; that Lake Park, between the east line of their lots and Lake Michigan, was dedicated to use of the public by the Government of the United States, "not to be occupied with buildings of any description," and that the original plat of Fort Dearborn addition, in accordance with which said lots were sold, dedicating the land east of said lots clear to the waters of Lake Michigan as public ground, not to be occupied with buildings of any description, and that said land, known as Michigan avenue and Lake Park, lying east of said lots and extending from Madison street on the south to Randolph street on the north, has been held and declared by the Supreme Court of this State by its decision, rendered at a time named in a case named, to be dedicated to the public for park purposes, and for park purposes only; and that the city holds the title thereto in trust only for such purposes, and that no encroachments should be made upon said land by any railroad company, nor allowed by the city council, and that the owner of property abutting on Michigan avenue should have the right to enjoin any such encroachments. The bill contains no other allegations tending to show the alleged trust, nor the dedication which it is claimed was made.

From these allegations it can not be told but that Michigan avenue is shown on the plat as a street; on the contrary, it may reasonably be inferred, from the language of the pleading, that it did so appear. Also, while in one place it is alleged that appellees' lots front east on Michigan avenue and Lake Park, it is also alleged that the land known as Michigan avenue and Lake Park, lying east of said lots, has been held and declared by the Supreme Court to be dedicated to the public, etc., thus making it uncertain as to what is the relative location of Michigan avenue and Lake Park with reference to appellees' lots. How far east

of appellees' lots is Michigan avenue, and how far east of the lots is Lake Park? What is the position of Michigan avenue in Lake Park? The bill fails to answer these queries.

In many places the bill speaks of Michigan avenue as a street, and alleges that defendant has operated its cars by cable beneath the surface of the street on Michigan avenue, from Madison to Randolph street, for a number of years last past.

Dedication is a question of intention of the dedicator, who must be the owner of the fee, and is not complete until accepted; and before the court can tell that there was a dedication, as claimed by appellees, the facts constituting such dedication should be set out, for *non constat* when the facts are stated, it may clearly appear that no dedication for the purpose claimed was complete. *Bongan v. Mann*, 59 Ill. 492; *Smith v. Town of Flora*, 64 Ill. 94; *City of Chicago v. Johnson*, 98 Ill. 618-24; *Littler v. City of Lincoln*, 106 Ill. 353-68; *Maywood Co. v. Maywood*, 118 Ill. 69.

The plat not being set out, and the allegations with reference to the alleged dedication of Lake Park being so indefinite and uncertain, there being no allegation as to when the plat was made, nor what it shows, nor as to who was the owner of the land alleged to have been dedicated, nor of its acceptance by the public, nor how it has been used by complainants or the public, we think the bill is insufficient as showing a dedication.

As to the allegations in regard to what was held and declared by the Supreme Court, they can not, in our opinion, be regarded as a statement of facts, but were conclusions of the pleader.

It is novel practice, and, so far as we are aware, unprecedented, to allege, as is done in this bill, that in another case, to which this appellant was not a party, so and so was decided. Such statements properly find their place in brief and argument. They are not sufficient as allegations that the question presented by the bill, viz., whether Michigan avenue is a public street, has been conclusively adjudicated against the defendant. It should at least appear who were

the parties to such suit, what the precise question for adjudication was before the court, and if defendant was not a party, what facts existed which would make the adjudication binding upon it. *Kitson v. Farwell*, 132 Ill. 327-38; *Smith v. U. S. Ex. Co.*, 135 Ill. 280-9; *Palmer v. Sanger*, 143 Ill. 45; *Wright v. Griffey*, 147 Ill. 498; *Leopold v. City of Chicago*, 150 Ill. 573.

Moreover, if it were conceded there was a complete dedication of the land in question, "as public ground not to be occupied with buildings of any description," we see nothing inconsistent, so far as appears from any allegations of fact in the bill, with such public ground being used for street purposes, and not as a park. It does not necessarily follow that land dedicated as public ground must be used as a park.

Because of the insufficiency of the allegations of the bill, we have not thought it necessary to consider the bearing on other questions discussed by counsel of the *Ward* case, *supra*, nor of the numerous ordinances (none of which are stated in the bill), statutes and decisions referred to by counsel, which, it is claimed, show the recognition of Michigan avenue as a street or as a part of Lake Park.

The injunction having been issued without sufficient allegations in the bill to warrant it, the order will be reversed and the injunction dissolved.

Mr. Justice Sears dissents.

Kerr Thread Co. v. Star Knitting Works, Max Abrahams, Julius Abrahams, Mrs. K. G. Peterson, Belding Bros. & Co., M. M. Belding, A. N. Belding, W. A. Stanton, Herman Prenzlauer and The Continental National Bank.

1. **SALES—By Insolvent Persons.**—Where creditors obtain a good title to property by purchase from a debtor, they have a right to use it as they deem best to enable them to realize in cash the amounts due them and paid by them as the consideration for the transfer.

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2. **EQUITY PRACTICE—Discretion in Referring Cases to the Master.**—The reference of a case to the master is a matter within the reasonable discretion of the trial court, and where it does not appear that this discretion was not properly exercised, the reference will be allowed to stand.

3. **AMENDMENTS—To the Record After the Term.**—Amendments to the record after the close of the term at which the case was finally disposed of should not be allowed where there is no memorandum, minute or note of the judge which can be made a part of the record by which to amend; the mere recollection of the judge, or affidavits of witnesses as to their recollection of what was said or done, do not supply the place of such minute or memorandum so made and preserved as a part of the record.

Creditor's Bill.—Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Hearing and decree dismissing the bill. Error by complainant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

STATEMENT.

This was a creditor's bill filed July 22, 1895, by plaintiff in error. It sets forth that a judgment was recovered in the Circuit Court against the Star Knitting Works, a corporation, July 19, 1895; that on or about July 11, 1895, the corporation transferred all its assets and tangible property to certain of its alleged creditors; that these conveyances were made with intent to hinder and delay the plaintiff in error in the collection of its judgment; that the consideration for the transfers was inadequate; that the transferees are converting the property so conveyed to them into cash, not only for the collection of their own debts, but for the purpose of aiding the debtor corporation and hindering and delaying its creditors; and that the debtor has also assigned and transferred its book accounts. The bill prays for a disclosure, the appointment of a receiver, that defendants be decreed to pay complainant's judgment, and for general relief. The bill was amended July 29, 1895, making new defendants, charging a conspiracy on the part of the defendants to defraud, and that there was no actual sale of the assets by the debtor, but a colorable transfer and secret trust.

The answer of the debtor corporation admits the recovery of the judgment, denies all conspiracy, and states that the transfer of its assets was made in payment and satisfaction of debts due and owing the grantees, and in good faith, for the sole purpose of paying such debts.

The defendants to whom the property was transferred also answer, stating that they each purchased certain of the debtor's assets, and that the consideration paid was the cancellation of indebtedness due to them respectively, and that the transfer subsequently made by them was for the same consideration which they paid; in other words, the payment of their debts.

A receiver was appointed for the Star Knitting Works. The cause was heard in open court and bill dismissed for want of equity at the cost of plaintiff in error.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for plaintiff in error.

JAMES A. PETERSON, attorney for defendants in error.

MR. JUSTICE FREEMAN, after making the above statement, delivered the opinion of the court.

The record in this cause is voluminous, and numerous errors are assigned; but the substance of them is that the court erred in dismissing the bill for want of equity, and in refusing to hold the original transfers by the judgment debtor, and especially the sale of the machinery and book accounts to Belding Bros. & Co., void as against the complainants.

The evidence tends to show that the debtor corporation owed the plaintiff in error for material purchased, and being unable to pay the debt when due, sought to obtain an extension. This being refused and suit commenced against it, its managers, considering that a judgment and execution would break up the business and enable plaintiff in error to obtain payment at the expense of the other creditors, determined to protect the creditors who were not pressing

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them. Accordingly, the debtor transferred all its assets, in payment of what it owed to the bank, to Belding Bros. & Co. and to one Prenzlaue.

It is contended by plaintiff in error that these transfers were not made in good faith. But no facts are alleged from which bad faith can be inferred, and it is not contended in the brief filed by plaintiff in error that the debtor corporation was not, in fact, indebted to the parties to whom the transfers were made. We find no sufficient evidence tending to show that the transferees were fraudulently seeking to hinder and delay other creditors. They were entitled to payment of their own debts, even though such payments exhausted the assets.

It is by no means clear that by a forced sale of the property so transferred, enough could have been realized to pay the debts due them, or that the consideration paid was inadequate.

But it is said that the subsequent transfer to Mrs. Peterson by the purchasers, and allowing her to reorganize and run the business, is evidence of a fraudulent purpose to enable the original stockholders to obtain control, "subject only to the debt or liability of these three creditors." The evidence fails to justify such a conclusion. If these three creditors obtained a good title to the property by the purchase, then they had a right to use it as they deemed best to enable them to realize in cash the amounts due them and paid by them as the consideration for the transfer.

It is said the transfer of the book accounts to Belding Bros. & Co. was fraudulent. But the evidence fails to sustain the charge. It is quite possible that they may in the end realize more than their debt, but it is not clear at all that this has been or will be the result.

Nor can we agree with counsel for plaintiff in error that it was error for the trial court to deny the motion for reference to a master. This was a matter within the reasonable discretion of the trial court, and it does not appear that this discretion was not properly exercised. We think it was. The bill did not seek for an accounting.

We find no substantial error in the rulings of the trial court upon the merits.

In view of the conclusion thus reached, there is no occasion to consider the motion to strike the reply brief from the files, nor to discuss the point made by defendant in error that the certificate of evidence filed June 30, 1896, in the trial court, is improperly in the record. It has been repeatedly held that amendments to the record after the close of the term at which the case was finally disposed of should not be allowed, where there is no memorandum, minute or note of the judge, which can be made a part of the record, by which to amend; and that the mere recollection of the judge or affidavits of witnesses as to their recollection of what was said or done, do not supply the place of such minute or memorandum so made and preserved as a part of the record. *Dougherty v. People*, 118 Ill. 160; *Horner v. Horner*, 37 Ill. App. 199; *People v. Anthony*, 129 Ill. on p. 222.

The decree of the Circuit Court is affirmed.

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Robert Rae, Jr., et al., v. Homestead Loan and Guaranty Company.

1. **CONTRACTS—*Payable in Gold Coin Valid.***—A contract expressly made payable in gold is valid, and is enforceable as made.

Foreclosure, of trust deed.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

ROBERT RAE, attorney for appellants.

WILSON, MOORE & MOLLVAIN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court. Appellant gave to appellee his bond, dated August 1, 1895,

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in the penal sum of \$9,800, conditioned for the payment of \$4,900 and interest "in gold coin of the United States of America of the present standard of weight and fineness." He also, at the same time, gave a trust deed conveying certain real estate to secure the performance of the provisions of said bond. Default having been made in the payment of interest, appellee declared the principal sum secured to be paid by said bond due and payable under the provisions thereof, and filed its bill in chancery to foreclose said trust deed. To said bill appellant filed his special demurrer, which was overruled. The appellant elected to abide by his demurrer, and upon proof taken in open court, final decree of foreclosure in the usual form was entered. As stated in brief of solicitor for appellant, "the subsequent proceedings after entering the default are not preserved in a certificate of evidence, and therefore no assignment of errors is possible" as to such subsequent proceedings.

The only question presented in this case is, whether the contract embodied in said bond for payment in "gold coin" is against public policy and void.

This question is most elaborately and exhaustively argued on behalf of appellant. But it is not an open question for this court, and even if we were disposed to sustain his position (which we are not), the validity of said bond is settled by the Supreme Court of this State in *Belford v. Woodford*, 158 Ill. 122. It is there held that a contract expressly made payable in gold coin is not void, but is enforceable as made.

The decree of the Circuit Court is affirmed.

Iroquois Furnace Co. v. Ross, McRae & Ross.

1. JURY—*Province of*.—The question as to whether a transaction is a sale or a lease is one of fact for the determination of the jury, under proper instructions from the court.

2. QUESTIONS OF FACT—*For the Jury*.—The questions as to whether a person is, as a matter of fact, the agent of another and authorized to

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represent him, and whether if he was not, his acts were afterward ratified, are questions of fact for the jury.

Assumpsit, for merchandise sold and delivered. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

DEFREES, BRACE & RITTER, attorneys for appellant.

BLISS & McKITTRICK, attorneys for appellees.

MR. JUSTICE HORTON delivered the opinion of the court. In December, 1896, appellees, as contractors with the city of Chicago, were constructing what was known as the extension of the 68th street tunnel, under Lake Michigan. In the prosecution of that work it became necessary to sink a steel cylinder. The mode of doing this was to put a platform on the top of the cylinder and force it down by loading a heavy weight on the platform. For this purpose appellees procured from appellant something over fifty tons of pig iron. On the part of appellant it is contended that appellees purchased the iron; on the part of appellees, that they borrowed it, promising to pay for any shortage and for its use.

When the iron was procured, appellees gave their check, payable to the order of appellant, for \$580.20, that being the total value of the iron at that time. Appellees say that this check was given as security only, and that the amount thereof was to be repaid to them by appellant, less the value of any shortage and a small sum for the use of the iron. Shortly afterward the iron was returned to the yard of appellant, the place from which it was taken. Appellant admits that the iron was thus returned, but denies that it was ever received or accepted by any one authorized by it so to do. The iron remained in appellant's yard at the time of the trial below. The verdict of the jury is in favor of appellees for \$532, which is an allowance to appellant of \$48.20, besides interest.

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Appellees delivered their said check to W. T. Forster, and at the time received from him a paper which was offered in evidence, and of which the following is a copy:

“DEC. 14, 1896.

We, the Iroquois Furnace Company of So. Chicago, agree to refund to Ross, McRae & Ross, on return of the pig iron borrowed from said Iroquois Furnace Co., the sum of five hundred eighty and 20-100 dollars, less small charge for use of pig iron, and for any shortage there may be.

IROQUOIS FURNACE CO.,

W. T. FORSTER.”

Appellant contends that it was error to admit said paper in evidence, and that it was also error to admit the testimony as to what was said by and between W. T. Forster and the representatives of appellees, at the time the iron was taken and the check and said paper delivered, because said Forster, as appellees knew at the time, had no authority to represent appellant. There is some conflict in the testimony as to what the facts were which bear upon the question of that authority and the alleged ratification of the acts of said Forster in signing said paper and receiving said check. In the same connection appellant contends that the trial court erred in refusing to give the second and third instructions asked by it, which were:

“2. The court instructs the jury that there is no evidence in the cause to show that W. T. Forster was the agent of the defendant company, or authorized by it to enter into contracts or arrangements upon its account.

“3. The court instructs the jury that there is no evidence in the cause to show any authority in W. T. Forster to execute the paper offered in evidence, dated December 14, 1896, and signed ‘Iroquois Furnace Company, W. T. Forster,’ as the agent of the said Furnace Company, and that the said defendant company is not bound by said paper.”

We perceive no error either in the admission of said testimony or refusing said instructions. Whether said Forster had authority to represent appellant, and whether, if he had

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not, his acts were afterward ratified by appellant, were questions of fact for the jury.

The next point made by appellant, in which error is claimed, is as to the instruction given for appellees. That instruction is long, but is summarized by attorneys for appellant in their brief to be, that if the jury "believed from the evidence (1) that it was agreed between the parties that the iron in question was to be loaned to the plaintiffs; (2) that the plaintiffs deposited the check offered in evidence only for the purpose of security, their verdict should be for the plaintiffs, and that the plaintiffs were entitled to recover the amount of the check, less certain deductions."

The criticism of this instruction is, that it omits any reference to the question "as to whether or not the plaintiffs had returned the iron for which the check was given." At the beginning of the trial, and in response to a question by the court, appellant, by its attorney, said, as to the iron, "We admit they brought it back and dumped it in our yard. We do not admit we ever received or accepted it." Appellant's weighmaster weighed it, and it is still in appellant's yard. Appellant's manager testified that it is there, and that it is of the same value as when taken by the appellees.

Instructions must be considered and interpreted in connection with the facts before the jury. One of the questions submitted to the jury by this instruction is whether the iron was "loaned to the plaintiffs." If it was loaned, then they had a right to return it, and appellant had no right to refuse to accept it, and if it did so refuse, that would not affect the rights of appellees. Appellant could not, by its own wrong, relieve itself of the duty to repay the amount of the check, less deductions directed by the instruction to be made. We see no reversible error in the giving of this instruction.

The point is also made that the court erred in admitting in evidence a letter written by appellant's manager to appellees' attorney, and in refusing afterward to "strike out" said letter, and in modifying the instruction asked by appellant in regard to the same. That letter was on its face

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admissible. After its admission, appellant recalled its manager to the witness stand, and in response to questions by appellant's attorney, he testified that "the letter was written in an effort to compromise the matter after a conversation over the 'phone."

It should be noticed that the appellees have not sought to vary this letter by parol, but that appellant called the writer of it to state what he intended by it, thus presenting a question of fact for the jury. No objection to that testimony was interposed. The instruction, as asked by the appellant, concerning this letter, was properly refused, and as modified and given was fully as favorable to appellant as it was entitled to have given.

The judgment of the Circuit Court is affirmed.

**Lander Kirke Whiton and Walter Starr Whiton v.
Louise Whiton.**

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| 76 | 553 |
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| 179s | 32 |

1. **CONTRACTS—*Agreement to Leave Property by Will.***—An agreement, made upon a good consideration, to leave property by will, is valid, and if the party making such an agreement fails to perform and dies intestate, or disposes of his property by will or by gift of testamentary character, contrary to the agreement, the courts will enforce the agreement against his heirs, legatees or devisees, when it can be equitably done.

2. **SAME—*Restricting the Power to Dispose of Property.***—As a general proposition such a contract can not operate to limit the power of the owner to use or dispose of his property during his lifetime. But this unrestricted power of disposal, by use or by gift *inter vivos*, does not extend to permit a disposal during life which is in effect a testamentary disposal and contrary to agreement.

3. **STATUTE OF FRAUDS—*Where it Does Not Apply.***—Where the consideration of an agreement, the payment of a sum of money, has been fully performed, and conditions of the contract are contained in a will executed by one of the parties, the statute of frauds does not apply.

Bill to Enforce an Agreement.—Trial in the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Hearing and decree dismissing the bill for want of equity. Appeal by complainants. Heard in this court at the March term, 1898. Reversed and remanded, with directions. Opinion filed July 21, 1898.

STATEMENT.

The bill of complaint in this cause avers that appellants and appellee are the only surviving children of Henry K. and Louise L. Whiton, both deceased; that Henry K. Whiton died in 1886; that by his will he bequeathed to Louise L. Whiton, his wife, among other things, all his bank stock and certain life insurance; and the residue of his estate was devised and bequeathed to Samuel G. Bailey and Warren J. Durham, as his executors and trustees.

By the fifth clause of the will the trustees were to take the residuary estate, collect the rents, issues and the profits thereof, and as soon as practicable to sell and convert into money all the real estate and unsecured claims and demands, and to invest the same in interest-bearing securities and then pay the dividends or income from such secured estate over to the wife to be her own property and to be used for her own support and the support and education of her children.

The will further provided that when the eldest child of testator and Louise L. Whiton should reach the age of twenty-five years, the residuary estate should be divided into as many equal parts as there should be children surviving, and one of such parts paid over to such child; and in like manner when each of the other children should reach such age, such child should receive his or her part.

The bill averred that Bailey and Durham, as executors and trustees, received letters testamentary and commenced the administration of their trust; that a few weeks prior to the 6th of June, 1895, Louise L., the mother, stated to appellants that she wanted more money out of her husband's estate; that she wanted \$12,000, but that the trustees, Bailey and Durham, would not pay her any more money without the consent of the appellants and appellee, upon the ground that she had received all that she was entitled to out of said estate; that she had a power of attorney from her daughter, the appellee, authorizing the mother to do in the matter whatever she (the mother) thought proper and right, and that she could get the money if appellants

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would consent to an order on the trustees to that effect, to be entered in a certain case then pending in the Circuit Court of Cook County, Illinois, wherein appellant Lander Kirke Whiton was complainant, and said Bailey and Durham and others were defendants; that she stated to appellant Starr Whiton, that if he would consent to the payment to her of \$12,000 by Bailey and Durham, she would make it all right with him in her will; that appellant Lander Kirke Whiton declined to consent to the entry of such order, or to give his authority for the payment of \$12,000 to her, or any other amount, because, as he stated to his mother, she had theretofore threatened him that she would disinherit him in her will, and that he was satisfied that his mother had received from the estate more than she was entitled to receive in accordance with the will and the condition of the estate; that thereupon the mother stated to appellants that she had no such disposition (to disinherit them), and in a conference had about the 28th day of May, 1895, it was proposed to the mother that she make a will, leaving her estate to her three children, appellants and appellee, equally, share and share alike; that then and there it was agreed by and between appellants and their mother that the former would consent to the entry of an order, such as desired, in said cause, authorizing and directing Bailey and Durham to pay over to their mother \$12,000 in securities and money upon condition that she should execute her will as above stated.

That on the 5th day of June, 1895, in pursuance of said agreement last mentioned, the mother made, executed, delivered and published her last will and testament, which was duly witnessed by two subscribing witnesses, a copy of which, with the exception of the signatures of the testatrix and the subscribing witnesses, is contained in the bill; that the will, in substance, after revoking any former wills, provided for the payment of all her debts and funeral expenses, and gave to her three children, the appellants and appellee, all the estate of which she might die possessed, in equal parts, share and share alike; that thereupon the appellants

and the mother for herself and as attorney in fact for appellee, together with the solicitor of said appellee, consented in writing to the entry of an order to be entered in the said chancery suit directing the payment of the \$12,000 in cash and securities to Louise L. Whiton; that such will was delivered to the Northern Trust Company; and afterward Bailey and Durham, as such executors and trustees, in pursuance of the order of court, paid and delivered to said Louise L. Whiton, from the estate of Henry K. Whiton, money and securities amounting to and of the value of \$12,000.

That Louise L. Whiton, the mother, died on or about December 27, 1896; and that prior to her decease, on or about November 21, 1895, without the knowledge of appellants, she made another will by which she bequeathed to appellants and one Arthur L. Whiton, a son of the father by a former wife, the sum of \$1,000 each, and the residue of her estate, of the value of upward of \$40,000, to appellee.

That since the death of the mother the appellee has informed the appellant Walter Starr Whiton, that when she and her mother were in Vienna, Austria, in the year 1896, the mother, by gift and transfer, gave to appellee all the estate of the mother, of every kind, being various securities specified in the bill, to the value of upward of \$40,000, all of which, with the exception of twenty shares of bank stock, was received by the mother from the estate of Henry K. Whiton.

That some time after the 5th of June, 1895, the said Louise L., without the knowledge or consent of appellants, took her will of the 5th of June away from the Northern Trust Company, where she had deposited it in accordance with the agreement between her and appellants; and appellants have no knowledge where it is, but they charge that it has been lost or destroyed; appellants further charge that it was the evident intention on the part of the said Louise L. Whiton in her lifetime to violate her agreement made with appellants on the 5th day of June, 1895; first in the execution of her will of November 21, 1895, then after-

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ward by making the gift in her lifetime to the said appellee.

That the gift to appellee by said Louise L. Whiton in her lifetime of the property, consisting of promissory notes, mortgages and bank stock, was made without any consideration from the appellee to said Louise L. Whiton except natural love and affection; and appellants charge that the same is not sufficient in law to support the gift to appellee as against said agreement between appellants and the said Louise L. and the said will made the 5th of June, 1895.

That on the 5th of June, when the agreement was made between appellants and Louise L. Whiton, the net income of the residuary estate of Henry K. Whiton was less than the amount which had been paid to the said Louise L. Whiton under the fifth clause of the will of Henry K. Whiton, and that there was nothing due to the said Louise L. Whiton from said estate; on the contrary, she had largely overdrawn.

Bill prays for an account of the property given to appellee by said Louise L. Whiton; for a decree finding and directing that appellants and appellee are each entitled to one-third of the property received by appellee as such gift; that the agreement of the 5th of June, as evidenced by said will of Louise L. Whiton on that day made, shall be performed, and prays for general relief. There was answer of appellee to the bill and replication thereto. The answer alleged that the order for the payment of the \$12,000 from the estate of Henry K. Whiton was agreed to by appellants in order to secure from Mrs. Whiton a release of all further interest in the estate, and denied that there was any other condition for the consent to such order, and denied specifically that the consent to the order was a consideration for any agreement by Mrs. Whiton to dispose of her property by will. The answer also denied the making of the alleged will of June 5, 1895, and set up the following writing executed by appellants and appellee:

“In re Estate of Louise L. }
Whiton, deceased. }

We, the undersigned, Lander Kirke Whiton, Walter

Starr Whiton and Louise Whiton, children of the said Louise L. Whiton, deceased, are advised that her certain last will and testament, having date November 21, 1895, is in the hands of Messrs. Dent & Whitman.

Said Louise L. Whiton having disposed of all her estate and effects after the date of said will, and having left no estate to be administered upon, we think it unnecessary to have any cost or expense incurred in reference to probating said will.

The debts of said Louise L. Whiton have been paid.
Chicago, 6th, 1897.

LANDER KIRKE WHITON.

WALTER STARR WHITON.

LOUISE WHITON.

An amendment to the answer sets up that the alleged agreement was not to be performed within one year, and was not "manifested by writing." Evidence was heard by the court, and upon the final hearing the bill was dismissed for want of equity.

JOHN S. COOPER, attorney for appellants, contended that an agreement, upon a consideration to leave property by will, is valid, and as between the parties, such will, when made, is irrevocable; and in case the party making such testamentary agreement, violates the same by leaving a will contrary to such agreement, or dies intestate, such agreement will be enforced, against his heirs, devisees, legatees, donees and purchasers with notice or without consideration. Johnson v. Hubbell, 10 N. J. Eq. 332; Van Duyne v. Freeland, 12 N. J. Eq. 142; Carmichael v. Carmichael, 72 Mich. 76; Parsell v. Stryker, 41 N. Y. 480; Gupton v. Gupton, 47 Mo. 37; Wright v. Tinsley, 30 Mo. 389; Hiatt v. Williams, 72 Mo. 214; Logan v. Weinholt, 7 Bligh (N. R.) 1; Jones v. Martin, 8 Brown's Cases in Parl. 242; Randall v. Willis, 5 Vesey, 266; Lewis v. Maddox, 8 Vesey, 150; Perdue v. Jackson, 1 Russ. Ch. 1; Chilliner v. Chilliner, 2 Vesey Sr. 527; Fortesque v. Hennah, 19 Vesey Jr. 67; Willis v. Black, 4 Russ. Ch. 171; Gregor v. Kemp, 3 Swanston, 404; Brinker v. Brinker, 7 Penn. St. 53; Lord Walpole's Case (Rufour v. Perren) 2 Hargrave's Juridical Arguments, 272.

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The agreement by which Mrs. Whiton made her will, bequeathing her estate to her three children equally, in consideration of the sum of \$12,000, was "concluded, certain, unambiguous, mutual, and upon a valuable consideration; it was perfectly fair in all its parts free from any misapprehension, fraud or mistake, imposition or surprise; it was not an unconscionable or hard bargain; its performance will not be oppressive upon appellee; and it is capable of specific execution through a decree of the court."

Pomeroy, in his Equity Jurisprudence, says, that the above, in suits for specific performance, are "the elements, conditions and incidents, as collected from the cases," which govern courts of equity in administering this species of relief. 3 Pom. Eq. Sec. 1404, note 1.

When all these elements, conditions and incidents exist, the remedial right is perfect in equity. 3 Pom. Eq., Sec. 1404.

JOHN M. GARTSIDE and PENCE & CARPENTER, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

We think that the evidence supports the allegations of the bill of complaint. Upon the facts alleged and proved the appellants sought relief, asking the court to decree that the property given by Mrs. Whiton to her daughter, appellee, was taken by appellee subject to the agreement of Mrs. Whiton to will a portion thereof to appellants, her sons, and that it was held by appellee as a trustee for the use promised by her donor to appellants; and to decree that appellee, as such trustee, carry out the agreement.

Counsel for appellee urge various reasons why this relief should not be granted, which are, in substance, first, that the alleged agreement with appellants is not sufficiently established; secondly, that the alleged consideration therefor is not shown; thirdly, that if established, the agreement is so uncertain as to its subject-matter that it will not be enforced; fourthly, that in any event such an agreement

can not operate to restrain complete dominion of the maker over her property during her lifetime, and that the gift to appellee being an out and out gift *inter vivos* was good, irrespective of such agreement; and finally, that the agreement in question comes under the application of the statute of frauds.

We think it clearly established by the evidence, that a distinct agreement was made by Mrs. Whiton to give by will to each of appellants a third part of the property which she might own at her death. John J. Knickerbocker, Esq., the lawyer who effected the bringing together of the parties to the agreement and the settlement of their then differences, testified as follows:

“Mrs. Whiton said she wanted more money; said she wanted some money from the trustees. That first statement was made when Kirke (one of appellants) was not there. Said she wanted Starr (one of appellants), one of her sons, to help her get money from the trustees. Starr Whiton said he wanted to see Kirke, his brother. Mrs. Whiton asked Starr to go and see his brother and bring Kirke to see his mother. Subsequently, and on the same day, when Starr was there with Kirke and their mother, she said to both of them that she wanted their aid, their consent to take more money out of the hands of the trustees. After, on consultation, they refused. They said they would not do it; refused to do it. Kirke left the office and the interview ceased. There were many conversations at which only Starr and his mother and myself were present, but the next conversation at which they were all present was in the office of Col. Cooper. We were assembled at Col. Cooper's office, and there was there the Colonel, Mrs. Whiton, the two boys, Starr and Kirke and myself, and I had dictated this will for her. The first that her attention was called to it was, I called them all in the room and the will was dictated and written, and I told Mrs. Whiton that there was trouble between her and her sons, and she wanted to know what it was; she asked me what it was. I said to her, that they said that she had

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threatened their disinherittance. She said, well, she said, 'I didn't mean that.' And Kirke says, 'Well, mother, you know you said it, and Starr and myself have not felt very well about it since.' And Mrs. Whiton said, 'Well, then, you are going to refuse to let me have any more money from the trustees.' And Kirke says, 'We have not said that yet, mother, but we don't like what you said about us and our father's estate, and we should want to know that that would not happen.' Q. What would not happen? A. The disinherittance, that was what we were talking about, and Mrs. Whiton asked me how that could be fixed, how it could be arranged, and I told her, in the presence of the boys, what I had told them in a conversation with them at Kirke's office before this interview the same day and at Col. Cooper's, and I repeated the conversation in their presence and hearing of what I had said to the boys and what the boys had said to me. I said to her, 'Mrs. Whiton, I have told these boys that I do not think that you contemplate anything of that kind, or that you contemplate their disinherittance.' I told them that I was so sure of it, that I felt satisfied that if they would come over here and consent to an order for your taking certain amount out of the estate—such an amount out of the estate, by order of court, as you ask for, that you would put it in such a way that they could not be disinherited; that you would make your will and give them their share when you died. Mrs. Whiton said to me in their presence, 'I like that, Mr. Knickerbocker, of your saying how I shall will my property, or tell me what I shall do with it.' I told her I did not purpose to do that; I had no right to do it, but that it was a family affair. They were all agreed that they wanted to close the estate; they wanted to get it out of the hands of the trustees to save expenses, and that if they were a united family it did not seem to me there was much difference who held the property, and the boys would feel better about it. They would be entirely satisfied and contented to let her take what she asked for, the \$12,000, pro-

vided she would make her will and divide it in equal parts between the brothers and the sister, the three children. Now, I says, 'Because I have drafted this will and it is here, you do not have to execute it; but this trouble is with your children, and it may be the shortest way to get peace in the family and to get what you want, if you intend that they shall have that share in your estate.' Well, she said she liked that, but she supposed she better do it, as she wanted to get money or securities, and she did do it. Q. Did what? A. Signed the will. The Court: Right there in their presence? A. Yes, sir, and in the presence of some other people; Mr. Cooper, myself, Mr. Lancaster, Miss Burnham, the stenographer, and I think John A. Henry was there. That done, I think it was late in the afternoon—that done, concluded the exercises of that day, excepting some things Mrs. Whiton said." Is shown a document (the order entered on the 6th of June for payment of \$12,000 to Mrs. Whiton). (To complainants' counsel:) "That was dictated in your office; I think you did it on the day and date on which the will was prepared. Q. At the time the will was prepared and executed? A. Yes, sir, that was part of the transaction." Order introduced in evidence. Signatures were made as certified. Does not remember whether document was made before or after the execution of Mrs. Whiton's will, but was made at the same time.

Q. "I will ask you whether there was any conversation between the parties there present when the will was executed, I mean between Mrs. Whiton and complainants, as to what should be done with the will? A. That it be delivered by me to the Northern Trust Company."

The testimony of this witness was in nowise contradicted. The will, to the execution of which he testified, was afterward, on August 2, 1895, taken from the Northern Trust Company by Mrs. Whiton, and nothing further was disclosed as to what had become of it. A stenographer's copy was, however, introduced in evidence. The will, after providing for funeral expenses, debts, etc., distributed the entire estate

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of testatrix between appellants and appellee, the survivor or survivors of them, share and share alike. The testimony of Mr. Knickerbocker, together with this will, establishes a distinct agreement as to which there can be no uncertainty of provision or subject-matter, save such uncertainty as to the latter as might arise by the subsequent use or disposal of her estate during life by Mrs. Whiton. We do not regard the writing signed by appellants in relation to the will of November 21, 1895, as at all inconsistent with the existence of this agreement. If the agreement existed, they had no interest in having that will probated, as their rights were in conflict with the provisions of that will.

We think it also established that there was a sufficient consideration moving to Mrs. Whiton for the making of this agreement. Counsel for appellee argue that the \$12,000 allowed to Mrs. Whiton by the order of court, to which appellants consented, was due to her and should have been allowed in any event, whether appellants consented or not. From an examination of the evidence we are convinced that no such sum was then due to Mrs. Whiton, she having before that time received all that was due to her under the fifth clause of the will of Henry K. Whiton. But it was in any event a disputed and contested matter, and the settlement of the controversy and the consent to an order as desired by Mrs. Whiton was a good and sufficient consideration for the agreement; and if, as we conclude from the evidence, Mrs. Whiton was entitled to no part of the \$12,000, then or thereafter, except by the consent of appellants, it was, in effect, a payment to her of \$8,000 of the money of appellants. The subsequent execution of the trust deed to secure a note of \$5,000 for the benefit of Mrs. Whiton has no bearing whatever upon this question, as argued by counsel, for it was done under another and entirely different provision of the Henry K. Whiton will, viz., to enable her to purchase another homestead. Neither do we regard as significant in this connection the fact that in a petition filed in the Circuit Court appellants alleged that Mrs. Whiton had relinquished all interest in the Henry K. Whiton

estate by quit-claim to appellants and appellee in consideration of the sum of \$12,000 and the mortgage securing the \$5,000. It was because she had then received all that was due to her from the estate that she thus quit-claimed, and a recital to that effect is in no way inconsistent with the fact that in receiving this amount she had received much more than was due her, and that the surplus constituted a consideration for the agreement in question. Counsel argue that by this quit-claim Mrs. Whiton relinquished some interest in the realty of the estate. We find in the evidence no warrant for such conclusion. On the contrary, it would seem that at the time of the execution of this release Mrs. Whiton had nothing whatever remaining which she could be entitled to receive from the estate under the will. We therefore conclude that the consideration for the agreement was sufficient.

We come, then, to a consideration of the argument that the agreement is of a nature so uncertain that courts will not enforce it. We think that this contention can not be maintained.

It may be regarded as settled that an agreement, made upon good consideration, to leave property by will, is valid, and if the party making such an agreement fails to perform and dies intestate, or disposes of his property by a will or by gift of testamentary character contrary to the agreement, the courts will enforce the agreement against his heirs, legatees or devisees, when it can be equitably done. 3 Parsons Cont. (6th Ed.) 406; Gregor v. Kemp, 3 Swanst. 404; Jones v. Martin, 5 Vesey, 265 (in note); Randall v. Willis, Id. 262; Fortescue v. Hennah, 19 Vesey, 67; Logan v. Weinholt, 7 Bligh (N. S.), 1; Johnson v. Hubbell, 10 N. J. Eq. 332; Van Duyne v. Vreeland, 12 Id. 142; Parsell v. Stryker, 41 N. Y. 480; Carmichael v. Carmichael, 72 Mich. 76; Wright v. Tinsley, 30 Mo. 389; Gupton v. Gupton, 47 Id. 37; Hiatt v. Williams, 72 Id. 214; Brinker v. Brinker, 7 Pa. St. 53.

In Johnson v. Hubbell, the New Jersey Court said: "There can be no doubt but that a person may make a

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valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by a conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man, in this way, to embarrass himself as to the final disposition of his property, but he is the disposer, by law, of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed, in the exercise of this branch of its jurisdiction."

In *Parsell v. Stryker*, the New York Court said: "As to plaintiff's equities, it made no difference whether the agreement was to deed the farm at a future day, on performance by plaintiff, or to devise the farm by a will made in the lifetime of the party, a court of equity will decree the specific performance of the latter agreement after death, when otherwise unobjectionable, equally with a contract to convey while living."

In *Carmichael v. Carmichael*, the Michigan Court said: "There is no doubt but it is competent for a person to make a valid agreement binding himself to make a particular disposition of his property by last will and testament. * * * But defendants claim that the contract, resting partly in parol, is void under the statute of frauds, etc. It is to be remembered, however, that the contract on the part of the father has been fully performed, and that Mrs. Carmichael, the mother, has received and accepted the benefits of such performance. A court of equity, under these circumstances, will not permit her to rescind this contract."

In *Wright v. Tinsley*, the Missouri Court said: "On principle, there would seem to be no ground to doubt that a person may, by valid agreement, renounce the power to

dispose of his property at his pleasure; may bind himself to make a will in a particular way on proper considerations; and that courts of equity will enforce such agreements under proper circumstances, the same as in other cases of valid contracts. While in some of the cases cited the courts refused to decree a specific performance of the agreement, they all recognized the power of individuals to make binding contracts of this nature, and relief was denied on different considerations."

Mr. Parsons, in reference to such agreements, says: "Yet it has been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms." As holding against this well established doctrine, counsel cite various decisions of our Supreme Court. We do not so understand these decisions, nor do we find in any one of them any expression which is at all in conflict with the rule announced.

In *Wallace v. Rappleye*, 103 Ill. 229, it was sought to enforce an alleged parol agreement by the father of an illegitimate child to support the child and make her his heir, the promise being made to the mother. The court, after criticising the degree of the proof, held that specific performance of such a contract, even when satisfactorily proven, is not a matter of right in the party, but a matter of sound discretion in the court, which grants or withholds relief according to the circumstances of each particular case, and that the uncertainty of a contract "to make one an heir," as to the amount of the party's property to be affected, is a circumstance to be considered in exercising this discretion. The court also held that there had been no act of performance by the other party to the contract which operated to take it out of the statute of frauds. In the case here under consideration, no such uncertainty exists. In the *Wallace* case the court carefully distinguished between the facts of that case and the facts of *Van Duyne v. Vreeland*, *supra*. Moreover, in the *Wallace* case, there was shown to exist

another contract by the same person to make certain provisions by will for another and a legitimate child. And the court makes the existence and validity, and, by inference, the enforceability of this latter contract a ground for refusal to specifically enforce the former, saying: "But if a case for specific performance were made out, we are of opinion that the covenant made by Wallace to Celia W. Wallace should be held a bar to any relief as against this appellant. By that covenant with Mrs. Wallace, in consideration of the release by her of her dower in his estate, Wallace agreed that on his death his and her son, the appellant, should receive the amount or portion of Wallace's estate that he was entitled to by the laws of Illinois. * * * He (appellant) does not stand as a mere heir, a volunteer, but he stands in the position of a purchaser, the purchase price being Mrs. Wallace's right of dower. * * * The covenant did provide that Wallace should not devise away any portion of appellant's share as heir, and it would be equally within the spirit and intent of the covenant that he should not contract it away by making another person an heir. The effect would be the same to diminish appellant's portion, whether a devisee was brought in by will, or a co-heir was brought in by contract, to share in the estate."

In *Mills v. Newbury*, 112 Ill. 123, the facts are in no manner similar to the facts of the case here. The uncertainty as to subject-matter there arose from the fact that the suit was carried on to assert a trust as to a remainder of property, uncertain because subject to use by one yet living, and by whom it might be completely disposed of or spent.

In *Woods v. Evans*, 113 Ill. 186, the agreement alleged was to take, maintain and educate an orphan of no kin to the promisor, and to give her, at his death, a child's part of his estate. The court again announced the rule that specific performance of such contracts was a matter, not of right, but of discretion, to grant or deny relief, as may appear equitable under all the facts and circumstances of the case; and held that the contract there was not based upon a sufficiently adequate consideration, and could not be regarded

as so fair and just and certain as to be specifically enforced; holding, too, that where it is attempted to enforce a distribution of an estate differently from the manner provided by law, a contract in parol, relied upon for such effect, should be looked upon with jealousy and weighed in the most scrupulous manner. The uncertainty of subject-matter arising in that case resulted from the words of the undertaking, viz., to give a child's part. The court, in commenting upon this uncertainty, asked: "At the time the agreement set out in the bill was made, what portion of Short's property was complainant entitled to receive under the contract? Was it one-third, a fourth, a fifth or a tenth?" And the court adds, as a ground for refusal of relief, "There is another serious objection to the enforcement of the contract in a court of equity. Its enforcement would work great injustice to the wife and lawful heirs of Short."

In *Shaw v. Schoonover*, 130 Ill. 451, the decision turned upon the sufficiency of proof.

In *Pond v. Sheean*, 132 Ill. 312, the court held that the contract was within the application of the statute of frauds, as the subject-matter was in part lands, and the contract, being treated as an entirety, could not operate upon the personalty alone.

In *Sloniger v. Sloniger*, 161 Ill. 270, the decision rested upon the insufficiency of proof of a contract and upon the application of the statute of frauds. The court said: "The statements in evidence of witnesses as to declarations made by Joel Sloniger in his lifetime are not so clear, certain and unambiguous as to establish, in our view of the case, a contract, taken in connection with the will, which we can enforce, and resulting in a disposition of his property different from that which would be made by law. * * * The cases cited by appellant's counsel in support of the proposition that the will in this case should be construed as a contract and enforced accordingly, are in the main cases where the testator had made an agreement to devise certain property, or had entered into a contract for the future execution of such a will. There was no agreement in the case at bar,

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separate and distinct from the will, which could bind the testator.”

Coulson v. Alpaugh, 163 Ill. 298, involved a question of a precatory trust, and we see no bearing which it can have upon the case here.

In Drennan v. Douglas, 102 Ill. 341, it was held that the consideration for the alleged promise arose from an illegal and immoral relationship between the parties, and hence that the agreement would not be enforced in a court of equity. And the court expressly declined to pass upon the question here involved, saying: “Under the facts of this case we do not deem it necessary to enter upon a consideration of the authorities, and determine the question whether a court of equity would or would not, under all circumstances, refuse relief when a bill is filed to enforce the specific performance of a contract to make a will.” We find nothing in any of these cases, relied upon by counsel for appellee, which supports their contention. And, while there has been no case, so far as we are advised, where our Supreme Court has sustained a decree specifically enforcing such an agreement as the one here, yet there has been a later expression of that court which, we think, clearly indicates its view of the weight of authority upon the subject.

In Dicken v. McKinley, 163 Ill. 318, the court, while holding that the contract in that case was not enforceable because barred by the statute of frauds, said: “The weight of authority is in favor of the position that a man may make a valid agreement to dispose of his property in a particular way by will, and that such contract may be enforced in equity after his decease against his heirs, devisees or personal representatives. But such contracts are looked upon with suspicion, and are only sustained when established by the clearest and strongest evidence.”

We regard the contract here as established by clear, positive and uncontroverted evidence. Nor was it a loose or a casual arrangement, but a very distinct agreement made in the presence of the lawyers who represented the parties and who undertook to preserve evidence of the transaction by

having a will prepared, executed and deposited for safe keeping.

It is also urged by counsel for appellee that even if such contract exists, and be held valid, yet it can not operate to limit the power of the owner to use or dispose of his property during lifetime. This, as a general proposition, is correct, and is amply supported by the authorities. *Jones v. Martin, supra*; *Fortescue v. Hennah, supra*; *Logan v. Weinholt, supra*; *Needham v. Kirkman*, 3 Barn. & Ald. 531; *Austin v. Davis*, 128 Ind. 472. See also cases cited in note to *Krell v. Codman*, 14 L. R. A. 860.

But it is as well established that this unrestricted power of disposal by use or by gift *inter vivos* does not extend to permit a disposal during life which is in effect a testamentary disposal and contrary to the agreement. *Gregor v. Kemp, supra*; *Fortescue v. Hennah, supra*; *Logan v. Weinholt, supra*; *Van Duyne v. Vreeland, supra*; *Jones v. Martin, supra*; *Bradish v. Bradish*, 2 Ball. & Beat. 479; *Johnson v. Hubbell, supra*.

It would seem clear from these authorities that any disposition during life, which was made for the purpose of effecting a testamentary disposal of the property subject to the agreement in a manner different from the provision of the agreement, would be ineffective as against the enforcement of the agreement. In *Gregor v. Kemp* the chancellor was of opinion "that notwithstanding the articles, Mrs. Kemp was not restrained from disposing of her estate any way in her lifetime, and had full power over it, but with this single exception, viz., she was restrained from making a distribution on purpose to defeat the covenant. * * * And the disposition is a plain fraud. * * * But supposing this disposition had not been with this avowed design to evade the article, yet we should have thought it, as it is circumstanced, a *donatio mortis causa* and not good, for otherwise articles of this nature will signify nothing, if they are thus eluded by a disposition a day or two before death."

In *Johnson v. Hubbell*, the chancellor said in this rela-

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tion: "But then the gifts which he makes in his lifetime to B. must be out and out. For if, to defraud or defeat the obligation which he has thus entered into, he gives to B. any property, real or personal, over which he retains a control, or in which he reserves an interest to himself, then, in order to protect the agreement or obligation, and to prevent his escaping, as it were, from his own contract, courts of equity will treat this gift to B. in the same manner as if it were purely testamentary and were included in a will; and the subject-matter of the gift will be brought back and made the fund out of which to perform the obligation."

In *Van Duyne v. Vreeland*, the chancellor said: "The agreement put no restraint whatever upon the parties to the free and unrestricted enjoyment of their property. They might give it away while they lived, but they could not make a disposition of it to take effect at their death.

* * * The defendant Vreeland had a perfect right to dispose of the property as he pleased, provided he did not make a disposition of it to take effect after his death, which would have been a fraud in law, or constructive fraud upon the agreement, whether he intended it as a fraud or not, or a disposition of it for the sole purpose of defrauding the complainant and depriving him of the benefit of his agreement which would have been an actual and positive fraud.

* * * After a careful examination of this part of the case, the conviction is produced upon my mind that there was actual fraud in this transaction, and that it was resorted to by the parties for the purpose of defrauding the complainant, and of placing the property in such a position that he could derive no benefit from it after the death of Vreeland."

In *Fortescue v. Hannah*, it was said: "It seems to me that the spirit of such a covenant requires that every disposition should be excluded which is in its effect testamentary, though not such in point of form." The question in that case was as to a gift by the maker of the agreement with a reservation to himself of an interest during his life, and the court held that such gift was testamentary in character.

In *Logan v. Weinholt*, the chancellor said, in referring to the decision in *Jones v. Martin*, *supra*: "His honor here lays down the principle to which I have adverted, that if in substance and effect the conveyance defeats or defrauds the obligation entered into, and is done with that object, having that tendency, producing that effect, though not in form testamentary, it is to be dealt with as if in fact it were testamentary, for the purpose of protecting the right, for the purpose of defeating the fraud, for the purpose of securing to the party under the agreement the right to that part of the estate to which he is entitled."

A valid agreement with appellants and consideration therefor, as alleged, having been established by the evidence, it remains to inquire whether the gift to appellee, though made *inter vivos* and absolute in form, was intended by the parties, donor and donee, to be testamentary in effect, and hence in fraud of the agreement. The evidence discloses that Mrs. Whiton at the time of the gift to appellee, which included all her property of every description, was living abroad. She was the widow of a former member of the Chicago bar, and it is apparent from all the facts in evidence that she was well advanced in years and without any earning capacity whatever when she thus divested herself of all her property and means of subsistence by this gift to appellee. It also appears that after the gift and until the time of her death, which followed some eleven weeks thereafter, Mrs. Whiton was supported, that is, her expenses were paid, by appellee. It is difficult to perceive how any doubt can exist as to the testamentary character of this gift. Surely this complete surrender of all her possessions, in a foreign land, and with no other reliance for support, could have been made by no sane person, save in view of immediate death or with a reservation of an interest, viz., her support therefrom during life. In either event the gift was of testamentary effect. If the gift was made in view of the near approach of death, it could not matter, so far as the character and purpose of the gift is concerned, that the expected death followed in eleven weeks rather

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than in a day or two, as in the case of *Gregor v. Kemp*. Nor would the fact that the reservation of an interest, to the extent of support through life, was by secret understanding, make the effect of such reservation any different. If any doubt remained, upon this state of facts, we think it would be settled by the answer and testimony of appellee. The answer alleges that appellants "were at all times since the death of their father aware and were frequently informed by the said Louise L. Whiton, that she intended to leave her entire estate to her daughter, this defendant, and that she had made, executed and declared her last will and testament, making such disposition of her entire estate." And further "this defendant admits that on or about the 12th day of October, A. D. 1896, while the said Louise L. Whiton and this defendant were sojourning together at Vienna, Austria, the said Louise L. Whiton, in compliance with her oft-repeated statement of her intention so to do, as hereinbefore set forth, duly transferred, assigned and delivered to this defendant all of the property and estate of the said Louise L. Whiton," etc. The intention, in compliance with which the gift is thus admitted to have been made, was an intention to "leave her entire estate to her daughter, this defendant." Appellee testified: "She (Mrs. Whiton) told me they wanted her to make one (a will) and that she always intended to leave her property to me."

It was admitted at the trial that the transfer to appellee was a gift, without consideration. Appellee testified that she paid the expenses of Mrs. Whiton from the time of the gift until her death. The will of November 21, 1895, executed after the will of June 5, 1893, which had been removed by Mrs. Whiton from the Northern Trust Company, made appellee the chief legatee. It thus appears from all the evidence that it was the great desire and fixed intention of Mrs. Whiton to leave her entire estate to appellee, and that it was in compliance with this intent that the gift was made. Such is the color given the transaction by appellee, the donee and only living witness as to what was done. We hold, therefore, that while no question could be successfully

raised as to the complete dominion of Mrs. Whiton over her property after the making of the agreement with appellants, provided such dominion was exercised in her lifetime by use, conveyance or gift absolute and in no manner testamentary in character, yet that the circumstances of this case are such as to clearly fix upon the gift to appellee a testamentary character, and hence to make it a fraud upon the agreement with appellants and subject to the equitable enforcement of that agreement.

The consideration for the agreement, viz., the relinquishment of \$8,000 to which appellants were entitled, was fully performed. The will containing the conditions of this undertaking by Mrs. Whiton was in writing. We think that the statute of frauds does not apply. *Davison v. Davison*, 2 Beas. (N. J.) 246; *Brinker v. Brinker*, 7 Pa. St. 53.

The decision reached makes it unnecessary to consider other questions raised by the briefs.

The decree is reversed and the cause remanded for further proceedings consistent with this decision. Reversed and remanded.

Richard C. Gunning et al. v. The People ex rel. Butterick Publishing Co.

1. **APPEALS**—*In Cases Relating to the Revenue*.—Appeals in all cases relating to the revenue, or in which the State is interested as a party or otherwise, must be taken directly to the Supreme Court.

2. **REVENUE**—*The Term Defined*.—The word "revenue," as used in the revenue act, is to be construed to embrace public revenue, whether State or municipal, all taxes and assessments imposed by public authority, and to special assessments for almost every municipal purpose, as well as to general taxes.

3. **SAME**—*Right of a Taxpayer Before the Board of Review*.—The right of a taxpayer to a hearing before a town board of review, when assembled, is clearly secured by the present statute. It is a substantial right and should not be taken away by implication.

Revenue Matters.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch

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Gunning v. The People.

Appellate Court of the First District at the March term, 1898. Appeal dismissed. Opinion filed May 31, 1898.

EDWARD H. MORRIS, attorney for appellants.

EDGAR BRONSON TOLMAN and HARVEY MITCHELL HARPER,
attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

We are met at the outset with a motion, continued from the last term, to dismiss this appeal, for the reason that it is a case relating to the revenue within the meaning of section 88 of the Practice Act, and that therefore this court is without jurisdiction to consider the case upon its merits.

In order that the scope and object of the proceeding may be seen, and therefrom a correct judgment be formed as to whether this is a case relating to the revenue within the meaning of the act referred to, we will adopt the following statement of facts :

The relator, a New York corporation, doing business in the cities of New York and Chicago, having personal property, on May 1, 1897, subject to taxation in the town of South Chicago, "of the fair cash value of not to exceed \$3,000," filed in the Superior Court of Cook County, on July 2, 1897, a petition for a writ of mandamus against, respectively, the assessor, clerk and supervisor of said town, commanding them and each of them to meet as the town board of review of the said town of South Chicago, and hold sessions from day to day, and hear and pass upon, in good faith, all the applications and complaints which have been or might thereafter be filed with them, and all such competent evidence as might be offered by the relator and other persons in the petition named, and by other similarly situated, etc., touching the assessment of taxes for the year 1897, upon property in said town.

It was alleged in said petition that said assessor, on June 11, 1897, and before the fourth Monday of said month, assessed the personal property of the relator in said town

at a sum at least four hundred per cent greater than its fair cash value; that in apt time, on June 28, 1897, the relator properly filed with and delivered to said town board of review its complaint and application in writing to have such assessment revised and corrected; and that on the same day certain named persons, firms and corporations, and many others, numbering about three hundred, "involving the assessments of property of the value of millions of dollars," filed with said town board complaints and applications, similar to the one filed by the relator.

The petition, in addition, contains numerous allegations of fraudulent actings and failures to act by said town board of review, and its final adjournment *sine die* without considering said complaints and applications, or either of them, except to dismiss the same in bulk without consideration.

The prayer of the petition was for the awarding of the writ of mandamus directed to the said assessor, clerk and supervisor, commanding them and each of them, as set forth in the abstract of the record filed in this court, as follows:

"That they meet as town board of review of the town of South Chicago, and that they hold sessions each day from day to day until they have actually in good faith heard all the applications and complaints which have been or may be hereafter filed with them, and that they receive and entertain all competent evidence and testimony which may be offered by this relator and the persons in this petition named, and all other persons similarly situated, who have or may have filed their applications or complaints with said board, and that they pass upon said applications and that they adjourn from day to day for one day only, until they shall have in good faith heard all of said objections and received all competent evidence offered in support thereof, and come to a determination in reference thereto; and that they shall continue in session until due opportunity has been given for all persons who have been heard, to know of the decision which said board has reached, and that an opportunity shall be given to file appeals from the decision of

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said board to the county board of Cook county pursuant to law. And that they shall continue in session until they shall give public notice of their decision in each case, and that they shall publicly announce their decision in each case, and that the said assessor and town clerk shall make and second and vote affirmatively in favor of resolutions, formally rescinding the illegal acts above set forth, and that said assessor shall produce all books in his possession containing the assessments of any person so complaining, and containing also assessments of other personal property of the same kind as that of the said complainants in the said town, and containing the assessments on other lands in the same neighborhood as that of the said complainants in said town, and that the said board remain in session and discharge their duties aforesaid until the further order of this court, and that such further order may be made in the premises as justice may require."

One of the members of the town board, the supervisor, answered the petition, confessing its allegations and consenting to the issuing of the writ; the others answered, taking issue upon all the material allegations of the petition, and upon a hearing a peremptory mandamus was ordered in fully as broad terms as was prayed.

Section 88 of the Practice Act provides that appeals "in all cases relating to revenue, or in which the State is interested as a party or otherwise, shall be taken directly to the Supreme Court."

It was held, in *Dement v. Rokker*, 126 Ill. 174, that the jurisdiction of the Supreme Court was defined by sections 88, 89 and 90 of the Practice Act, and that section 8 of the Appellate Court Act of June 6, 1887, could not constitutionally (Sec. 13, Art. 4 of the Constitution) and did not profess to repeal the sections of the practice act referred to, nor to assume to revise them, or to re-enact laws covering the same subject-matter, and that its jurisdiction was unaffected by said later act.

Later on, without apparently impinging upon the holding in the *Dement* case, the Supreme Court decided that

said section 8 operated as an amendment to section 88 of the Practice Act, and should be read and construed as a part thereof. *Lee v. People*, 140 Ill. 536.

And in *Lynn v. Lynn*, 160 Ill. 307, it was again held that said sections 8 and 88 must be considered and construed together. Being so considered and construed, it is as if the quoted part of said section 88 were expressly added to the limitations to the jurisdiction of the Appellate Court imposed by said section 8. There can, therefore, be no question, and none is made, but that cases directly relating to the revenue go upon appeal directly to the Supreme Court, notwithstanding that clause of section 8 of the Appellate Court Act giving jurisdiction to the Appellate Court of all matters of appeal in "any suit or proceeding at law," if considered alone, might give rise to a different conclusion.

But whether the case here presented be one "relating to the revenue, or in which the State is interested as a party or otherwise," is a matter of considerable uncertainty so far as express adjudication goes.

The appellee speaks of the question as being one of "first impression," and the appellant seems to rely upon a definition to be found in *Hodge v. The People*, 96 Ill. 423, of what suits may be considered as relating to the revenue within the meaning of the act, and upon other decisions of both the Supreme and Appellate Courts upholding the jurisdiction of the latter courts in cases where the revenue was only incidentally involved; and insists that it is only such a case as involves directly the collection of revenue, *i. e.*, such as is brought for the collection of taxes, or to prevent the collection of the same that is covered by the act.

The word "revenue" as used in the act has been construed by the Supreme Court to "embrace public revenue, whether State or municipal—to embrace all taxes and assessments imposed by public authority." *Webster v. The People*, 98 Ill. 343.

And it has been applied to special assessments for almost

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every municipal purpose—as well as to general taxes—in cases where the jurisdiction of the Supreme Court has been asserted, and that of the Appellate Courts denied. *Potwin v. Johnson*, 106 Ill. 532; *People v. Springer*, 106 Ill. 542; *Herhold v. City*, 106 Ill. 547.

And from a judgment in an action upon an appeal bond, given upon appeal from an assessment of benefits upon certain land, it was held that the Supreme Court and not the Appellate had jurisdiction, upon the ground that the sum recoverable in such a suit was the amount of the assessment, and would become a part of the public funds, and in such regard it was not material whether it was collected on the assessment or on the bond. *Kilgour v. Drainage Commissioners*, 111 Ill. 342.

On the contrary, numerous cases exist in which the jurisdiction of the Appellate Court has been upheld, but they seem to have been cases that related only incidentally to the revenue. Wherever the revenue was directly involved the jurisdiction of the Supreme Court has been maintained to the exclusion of the Appellate Court.

The appellant says that “no matter what the outcome of this appeal may be, in no way does it determine whether appellee must pay taxes, or how much.”

That, we think, is too narrow a statement to be applicable here.

Will the public revenue be diminished or increased, or is it liable to be, as a result of the proceedings; not, will it be applied in a particular manner, as was the case in *Supervisors v. The People*, 159 Ill. 242, nor where, as in *Hodge v. The People*, 96 Ill. 423, the revenue might be incidentally increased by a recovery from the sheriff of fees collected and retained by him in excess of his proper salary. The assessments involved in the case at bar are an imposition by the lawfully constituted public authorities upon or against the tax-paying public composed of many individuals.

The scope of the petition was to obtain a review by the town board of the assessments made by the assessor upon property of the alleged value of millions of dollars; and the

judgment awarding the peremptory writ directed the three officials, composing the town board, to assemble as a town board of review, and consider and hear evidence in support of the complaints filed and decide upon the same, and if the complaints proved to be well founded, to revise and correct the assessments.

We have, in this connection, no concern with the particular result of the proceeding, but only with whether the tendency of the proceeding was to directly affect the public revenue.

For present purposes it was immaterial whether the assessment should stand or become increased or diminished. It is enough that the proceeding was an attack upon the assessment as made by the assessor, and tended directly to affect its validity.

It was held in *Hough v. Hastings*, 18 Ill. 312, that the statute requiring the meeting of the town officers as a board of review was imperative—as much so as that the property should be originally assessed by the assessor; and that a right to a hearing before such board was granted by the law to every tax payer, and if deprived of the right, he could not be bound by the assessment.

That decision was made under a statute different in words from the present one, but not variant in meaning, and although in that case the board did not meet at all, and in this case it did meet, the right to a hearing before it in this case was in every substantial sense denied.

Since that decision was made, the legislature has enacted (Sec. 88, Revenue Act) that a failure of the town board of review to meet, shall not vitiate the assessment made by the assessor, “except as to the excess of valuation or tax thereon, shown to be unjustly made or levied,” but we know of no legislation which deprives the decision of its effect, as being the law, in cases where, as here, the town board did meet but peremptorily dismissed the complaints without permitting a hearing by a tax payer. The right of a tax payer to a hearing before a town board of review, when assembled, is as clearly secured by the present statute as by

Rubel v. Allegetti Chocolate Cream Co.

the old one, and is as substantial a right now as it ever was, and should not be taken away by implication.

But even though it should be held that subsequent legislation had done away with the whole law of *Hough v. Hastings, supra*, there remains the exception, reserved by such legislation, "as to the excessive valuation or tax thereon * * * unjustly made or levied," and to that extent, at least, the public revenue seems to be clearly involved in this proceeding, within the meaning of section 88 of the Practice Act.

Our conclusion is, that this court is without jurisdiction, and therefore the appeal will be dismissed.

B. F. Rubel et al. v. Allegetti Chocolate Cream Co.

1. **TRADE-MARKS—*Allegetti—Chocolate Creams.***—If a person makes use of his own name as a trade-mark, and then transfers to another the business in which his name has been so used, the right to continue the use of the name will follow the business, as often as it may be transferred.

2. **SAME.—*Assignment of Trade-marks and Trade-names.***—An assignment of the property and effects of a business carries with it exclusive right to use such trade-marks and trade-names as have been used in such business; they attach to the business or right of manufacture and pass with it.

3. **SAME—*Right to Use or Assimilate the Name of Another.***—One firm is not at liberty to so use or assimilate the name of another firm or corporation as to pass off themselves for that other, or their goods for the goods of that other.

4. **SAME—*Interference by Injunction.***—In order to authorize the interference of chancery it is not necessary that a trade-mark should be copied with the fullest accuracy. An imitation, which varies from the original in some particulars, may be restrained if it is calculated to deceive and may be taken for the original.

Bill for Injunction, to restrain the use of a trade-name. Trial in the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

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STATEMENT.

The final decree entered in this cause by the court below is as follows:

"This case coming on to be heard on the bill of complaint herein, answer of defendants and complainant's replication thereto, the court—having heard the evidence adduced by complainant and defendants, and arguments of counsel, and being fully advised in the premises—doth find that the equities of said bill are with the complainant; that complainant has full right and title to the use of the name or word 'Allegretti,' as alleged in said bill; that the material allegations in said bill are true.

It is therefore ordered, adjudged and decreed by the court that said defendants, B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and each of them, their agents, servants, attorneys, representatives or assigns, be perpetually enjoined and restrained from using the name 'Allegretti' or 'Allegretti & Co.' in the sale of chocolate creams and confectionery in the county of Cook aforesaid, except when such use is coupled with words clearly indicating that such goods were manufactured and are sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company, and that said complainant do have judgment herein for its costs in this proceeding, to be taxed by the clerk."

For some twenty-five years one Ignazio Allegretti has been manufacturing and selling confections in different cities in the United States. Since 1880 he has been manufacturing and selling what have during that time been called "Allegretti Chocolate Creams." He came to Chicago just prior to the World's Columbian Exposition, where he has continued in that business since 1892. In November, 1894, he took two of his sons into business with himself under the firm name of Allegretti Brothers. That firm continued the business until November 10, 1896, when the appellee succeeded to and has since continued the same business. Said Ignazio and his two sons, composing the firm of Allegretti Bros., are the only stockholders, and the

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only persons interested in the Alleghetti Chocolate Cream Co., the appellee, an Illinois corporation. The appellee succeeded to, and continued the business theretofore conducted by Alleghetti Bros. Said Ignazio Alleghetti, and said Alleghetti Bros., and said Alleghetti Chocolate Cream Company, are the only parties who ever made and sold, under that name, Alleghetti Chocolate Creams in the United States except appellants, as hereinafter stated. Said parties have successively sold such creams, not only in Chicago, but in New York City and throughout this country and in Europe.

Appellant Giacomo Alleghetti is a nephew of Ignazio; came to this country from Italy in 1891; has been in the employ of said Ignazio and his firm most of the time since, and had been in the employ of said Alleghetti Bros. over a year next prior to August 18, 1896, when he left them. At that time said firm was located at 131 Wabash avenue, Chicago. Seven days thereafter, on the 25th day of August, 1896, there appeared in the columns of the Chicago Daily News the following advertisement:

“Originator and sole possessor of the genuine process for manufacturing Alleghetti’s chocolate creams. I wish partner with capital and services to start and push the business to its utmost capacity. Address D 72, Daily News.”

A few days after the publication of the above, appellant Giacomo Alleghetti appeared at the hardware store of the other appellants at 77 Lake street, Chicago. Appellant I. A. Rubel says that Giacomo came there to rent a place, and said he wanted a partner; that he could make very fine chocolate creams. I. A. Rubel testifies thus: “I told him I would go in with him if what he stated were the facts. So he rigged up a place on the fourth floor of 77 Lake street, and put in a stove and other things necessary for making candy, and the candy turned out very nice, and we formed a copartnership.”

The appellant B. F. Rubel says that at the time the partnership was formed he and his brother knew of the existence of the firm of Alleghetti Bros., and that they first

satisfied themselves that Giacomo "was the gentleman he represented himself to be."

Giacomo informed the Rubels before they became partners that he had worked for the other Allegrettis, and stated that while working there he had improved upon the making of the chocolate creams. September 5th, I. A. Rubel went to the place where Allegretti Bros. procured chocolate, and inquired for and purchased some of the same kind of chocolate used by them. This was used by Giacomo in making the sample batch at Rubel's store, 77 Lake street. I. A. Rubel had before that time purchased Allegretti chocolate creams. While negotiating with Giacomo he went to the Allegretti Wabash avenue store, and asked if they sold 200 pounds per day, and was told by Joseph Allegretti that they sold that amount in the morning.

The appellants entered into their partnership agreement September 12, 1896. Appellant Giacomo contributed nothing to the capital of that firm except, as stated, "his name" and "his experience." The capital was all contributed by the Rubels. The profits were to be divided equally between the three. The firm name agreed upon was "Allegretti & Co." I. A. Rubel says that they did not adopt the firm name of Rubel & Co., or Allegretti & Rubel, "because we did not want to; we simply wanted it Allegretti & Company."

September 22d, appellants opened a store at 161 State street, and commenced the sale of Allegretti chocolate creams. That store is in the same block fronting State street that the Allegretti store was in fronting Wabash avenue (No. 131). Appellants used the same kind of lettering on their show windows, and displayed the chocolate creams in the same style and shapes as appeared at the store, 131 Wabash avenue. They purchased some of their chocolate of the same kind and at the same place, used similar boxes and labels, shipped in the same kind of packing boxes as those used by Allegretti Bros. They were not only selling Allegretti chocolate creams at retail in Chicago, but they were selling them at wholesale, and shipping them

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to New York and other places, using, in so doing, similar boxes, labels and packing boxes to those which had been used by Ignazio Allegretti and Allegretti Bros., and were being used by the Allegretti Chocolate Cream Co., appellee, when this bill of complaint was filed.

CLYDE E. MARSH, attorney for appellants; Dow, WALKER & WALKER, of counsel.

An examination of the following and kindred cases wherein the use of a person's name has been regulated, will show that in most instances conscious, intentional, fraudulent misrepresentation on the part of the defendant has been resorted to; in others there was such a combined use of the name with other marks, characters, figures, or form and arrangement of circulars, advertisements, etc., as to amount to a false representation, and the combination only was enjoined. No instance can be found where the use of the name only, in good faith, has been stopped. See *Croft v. Day*, 7 Beavan, 84; *Holloway v. Holloway*, 13 Beavan, 213; *Clark v. Clark*, 25 Barb. (N. Y.) 78; *Sykes v. Sykes*, 3 Barn. & Cress. 541; *Metzler v. Wood*, L. R., 8 Ch. Div. 179; *Devlin v. Devlin*, 69 N. Y. 214; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Shaver v. Shaver*, 54 Iowa, 213; *Stonebraker v. Stonebraker*, 33 Md. 268; *Williams v. Brooks*, 50 Conn. 278; *Meriden Britannia Co. v. Parker*, 39 Conn. 450.

Upon the other hand there has been, from the first to the present time, a general concensus of judicial opinion that the use of a personal name in a fair, honest and ordinary business manner, could not be prevented, even if damage resulted therefrom. *Croft v. Day*, 7 Beavan, 84; *Holloway v. Holloway*, 13 Id. 213; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Faber v. Faber*, 49 Barb. (N. Y.) 357; *Clark v. Clark*, 25 Id. 80; *Meneely v. Meneely*, 62 N. Y. 427; *Comstock v. Moore*, 18 How. Pr. 424; *Gilman v. Hunnewell*, 122 Mass. 139; *McLean v. Fleming*, 96 U. S. 252; *Carmichel v. Latimer*, 11 R. I. 395; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Singer Mfg. Co. v. Long*, L. R., 18 Ch. Div. 412.

MORAN, KRAUS & MAYER, also of counsel.

Every man has an absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion results from the similarity of names, the courts will not interfere. Opinion of Rapallo, J., in *Meneely v. Meneely*, 62 N. Y. 427.

A manufacturer has a right to attach his own name to his manufactures, even though a rival manufacturer of the same name, who has given it prestige in the market, may suffer in consequence. The resulting damage is *damnum absque injuria*. *Carmichel v. Latimer*, 11 R. I. 395. See also *Decker v. Decker*, 52 How. Pr. (N. Y.) 218.

"A person may have a right in his own name as a trade mark as against a person of a different name. But he can not have such a right as against a person of the same name, unless the defendant uses a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture." *Gilman v. Hunnewell*, 122 Mass. 139.

"A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property; if such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances of cases are *damnum absque injuria*." *Brown Chemical Company v. Meyer*, 139 U. S. 542.

DOUGLAS C. GREGG, attorney for appellee; DARROW, THOMAS & THOMPSON, of counsel.

MR. JUSTICE HORTON, after giving the foregoing statement, delivered the opinion of the court.

The contest in this case arises as to the use, and the right

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to the use, of the name "Allegretti" in connection with the manufacture and sale of chocolate cream candy. No point or suggestion is made in the briefs or arguments of counsel as to the phraseology of the restraining decree quoted. The case is presented upon the broad question that appellants have a right, as against appellee, to use the firm name "Allegretti & Co." in just the manner they have been and are using it.

Appellants contend that appellee can not maintain its bill of complaint filed in this case, because (1) no right exists in any one such as to justify the entry of said decree; and (2) if any such right ever existed, it never passed to appellee.

It is not necessary for the purposes of this case to determine whether the right contended for by appellee be a trade-mark, or trade-name, or good will, or by what name such right be designated. The important inquiry is, did the alleged right exist in the appellee when its bill was filed? There is no testimony showing that Allegretti Bros. executed and delivered to appellee any formal assignment or transfer of the right claimed. But no such formal transfer is necessary to vest the right in appellee if such right existed in Allegretti Bros.

In *Snyder Mfg. Co. v. Snyder*, 54 O. St. 86, 97, the Supreme Court, quoting from *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 816, states the rule thus: "If one has made of his own name a trade-mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred."

In *Williams v. Farrand*, 88 Mich. 473, 480, it is held "that an assignment of all the stock, property and effects of a business * * * carries with it the exclusive right to use * * * such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture and pass with it. Courts have uniformly held that a trade-mark has no separate existence; that there is no property in words, as detached from the thing to which they are applied; and that a conveyance

of the thing to which it is attached carries with it the name."

In the case of *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, the business of the firm of Fish Bros., wagon manufacturers at Racine, together with all the property and assets, passed to Fish Bros. & Co., agents; thence into the hands of a receiver; thence to the Fish Bros. Wagon Co., a corporation. The Fish brothers remained in the business through the successive changes and became officers of the corporation, although the majority of the stock was owned by others. During all this time the wagons were marked "Fish Bros." "Fish Bros. & Co., Agents," or "Fish Wagons," or with a picture of a fish on which were the words "Bros.," "Bros. & Co." or "Wagon," and were advertised under those names and with a picture. Several years after the organization of the corporation the Fish brothers withdrew therefrom and formed a partnership to manufacture and deal in wagons in another place, under the name of Fish Bros. & Co. In an action against them by the corporation it is held that the latter had acquired the good will of the original business and the right to use the said names and pictures as trade-marks, although the same were not specifically mentioned in any of the transfers of the business to the corporation.

In the case of *Merry v. Hoopes*, 111 N. Y. 415, it is held that where, upon the dissolution of a firm, one of the partners purchases and succeeds to the business of the firm, the exclusive right to use trade-marks belonging to the firm passes to the purchaser, although no express mention is made of them in the deed of assignment.

There was no express assignment in *Feder v. Benkert*, 18 U. S. Cir. Ct. Appeals, 549, yet it was there held that the trade-mark passed to the several successors, although no one originally connected with the firm had any longer any interest therein.

In the case at bar the same persons, Ignazio Allegretti and his two sons who composed the firm of Allegretti Bros., own all the capital stock of the appellee. The same per-

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sons continue the same business in the same manner. The material inquiry upon this branch of the case is whether any such right as the appellee contends for ever passed from Allegretti Bros. to appellee, not when it passed. If Allegretti Bros. had such a right that they could have maintained this suit in case the appellee had not succeeded to their business, then the appellee may maintain the suit, notwithstanding the fact that it succeeded to such right after appellants had commenced business. The fact, if it be a fact, that they had commenced pirating before appellee succeeded to the business, does not justify its continuance afterward.

The further question is whether appellants are so using the firm name "Allegretti & Co." as to justify the intervention of a court of equity by injunction.

One firm is not at liberty to so use or assimilate the name of another firm, or of a corporation, as to pass off themselves for that other, or their goods for the goods of that other.

The law is very tersely and clearly stated by Beck, J., speaking for the Supreme Court in *Shaver v. Shaver*, 54 Ia. 208, 211, thus: "In order to authorize the interference of chancery it is not necessary that the trade-mark should be copied with the fullest accuracy. An imitation which varies from the original, in some particulars, may be restrained. The rule is, that if the imitation is calculated to deceive, and may be taken for the original, its use will be restrained."

In *Lee v. Haley*, 5 Ch. Appeal Cases, 155, the complainants, who were and for some years had been doing business as coal dealers in Pall Mall, London, under the name "The Guinea Coal Company," sought to restrain the defendant from doing the same kind of business on the same street, under the name "The Pall Mall Guinea Coal Company." A number of other companies who called themselves Guinea Coal Companies, some with prefixes and others with no prefixes, were engaged in the same business in the same city. In sustaining the interlocutory restraining order entered by

the vice-chancellor, Sir G. M. Gifford, L. J., said (p. 161): "I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceeds is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to the name."

The rule as above stated seems to be the well settled law. *Russia Cement Co. v. Le Page*, 147 Mass. 206; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, *supra*; *Shaver v. Shaver*, *supra*; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462.

Do the facts in this case show that this rule should be applied as against appellants? We think they do. It hardly seems probable that any one familiar with the facts would contend otherwise as to Giacomo Allegretti. Only seven days after he left the employ of Allegretti Bros., he advertised in the public press that he was the "originator and sole possessor of the genuine process for manufacturing Allegretti chocolate creams." It would be idle to attempt to argue that this was not calculated and intended to deceive.

Within a few days Giacomo was making a batch of chocolate creams in a loft of the hardware store of the other appellants, where temporary arrangements were made for that purpose. The other appellants also made inquiry to satisfy themselves as to whether Giacomo "was the gentleman he represented himself to be." They were familiar with the Allegretti chocolate creams, and one of them even went to the place of business of Allegretti Bros., and inquired as to the amount of their sales. In less than twenty days after said advertisement appeared, appellants had formed their partnership under the firm name "Allegretti & Co.," and within the next ten days thereafter they had rented a store on the principal retail business street in this

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city, fitted it up for occupancy, procured the necessary utensils for manufacturing, procured the necessary boxes, printing, etc., and entered upon the manufacture and sale of Allegretti chocolate creams. The letters upon their windows were the same kind as those used on the windows of Allegretti Bros., and the chocolate creams displayed had the same general appearance. The boxes in which the creams were put were very similar. The lettering upon the boxes has a great similarity. The words "Allegretti" and "Chocolate Creams" are displayed in gilt as the prominent and principal words. They are upon heavy and highly glazed paper, as were those of Allegretti Bros.

And then, why was the name Allegretti used as the only one appearing in the firm name? The answer given by the Rubels, when on the witness stand, was that they used this name "because they wanted to." This is a peculiar, or at least an uncommon name in this country. We are impressed with the firm conviction that if Giacomo Allegretti had been known by some familiar name not connected with the particular kind of business that his firm was about to enter upon, his name would not have been the only name used to designate the firm. The similarity shown by this record is so great as to compel the conclusion that it could only exist as the result of design and intent. "Similarity, not identity, is the usual recourse where one party seeks to benefit himself by the good name of another."

The decree of the Superior Court is affirmed.

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1. INSTRUCTIONS—*Not Marked "Given."*—Where the record shows that the instructions were in fact given to the jury, the case will not be reversed because the trial court inadvertently failed to mark them "Given."

2. APPELLATE COURT PRACTICE—*Motions for New Trials and Assignments of Error.*—Where the point that an instruction was given to the jury without being marked "Given," is not specifically made either in

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the written motion for a new trial filed in the court below, or in the errors assigned in the Appellate Court, it can not be urged as a ground for reversal.

8. PRACTICE—*Motions for New Trial*.—Only one copy of a motion for a new trial with the reasons is required, and that is to be filed with papers so that both court and counsel may have access to it.

4. SAME—*After Motion Filed*.—A party is not bound to read his motion for a new trial to the court *in extenso*, or to comment upon each and every item thereof. He will not be deemed to have waived the points not read or commented upon provided he has not in some manner deceived the trial court or otherwise waived such points.

5. FELLOW-SERVANTS—*Risks of Negligence of*.—The negligence of fellow-servants is one of the ordinary perils of the service, of which one takes the hazard in entering into an employment.

6. SAME—*Personal Acquaintance*.—A personal acquaintance between different servants of the same master is not necessary to constitute the relation of fellow-servants.

7. EMPLOYER AND EMPLOYEE—*The Former Not an Insurer*.—The rule that a common carrier of persons for hire is practically an insurer of the safety of passengers does not exist in the case of employer and employee.

8. SAME—*Where Neither are at Fault—Accidents*.—Where neither employer nor employee is to any extent at fault, then, as between them, any injury or damage which may come to either of them by reason of the employment must be held, in law, to be from an accident for which neither is liable to the other.

9. SAME—*Duty of Employer*.—The law requires of every employer that he be vigilant and careful, and that he exercise every reasonable care and caution in the selection of co-employees for the safety and protection of all persons employed by him.

10. SAME—*Reciprocal Duties and Obligations*.—The duties and obligations of employer and employee, though greatly differing in extent, are reciprocal. Neither is an insurer of the other against every injury which may result from an accident, where he is not guilty of any negligence or lack of proper care or caution.

Trespass on the Case.—Death from negligence. Trial in the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Verdict and judgment for plaintiff, \$5,000. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Reversed. Opinion filed May 31, 1898.

STATEMENT.

This suit was commenced by appellee to recover from appellant for damages caused by the death of Peter Bell through the negligence of one of its employes. It is not

claimed that there was any negligence on the part of appellant by reason of any defects in, or in the use of, imperfect or insufficient appliances, or for the want of proper care in the selection of its employes.

The accident resulting in the death of said Peter Bell occurred in the afternoon, January 7, 1893, in the Manufactures Building in the World's Fair grounds. Deceased was in the employ of appellant in what was known as the Color Department. He was one of, perhaps, one hundred painters thus employed in and about said building, all of them being under the same foreman and the same assistant foreman, and doing the same kind of work. A part of the time these painters were calcimining or painting where it was necessary to use scaffolds or stages, which were hung or suspended from some beam or rafter by ropes and pulley blocks so that they could be hoisted and lowered to the desired height by the painters using them. They were hung by what are called "riggers," that is, by sailors, who were familiar with handling and tying ropes. These stages were made like ladders, with boards or planks over them; some were twenty and some twenty-four feet long, supported at each end by the ropes mentioned. There were about thirty such stages in use in that one building. They were usually hung end to end near to each other, but sometimes at such distance that the painters put a plank over the space so that they could pass from one to the other.

Upon each of these stages, when in use, there were sometimes two and sometimes three men, called a gang. At the time the accident occurred there were but two men on the stage where deceased was, viz., the deceased and William J. Lehigh. Upon the stage next south there were three men, viz., one Matson, Charles Olsen and John Smith Elisius. Each gang painted what was called a "stretch," *i. e.*, a strip about the same width as the length of the stage each occupied, so that the "stretch" painted by one gang would meet with that painted by the next gang. The stages could be hoisted or lowered independent of each other, except where they were connected by a plank, as stated, or

where they were lashed together, as it was "a common thing to do." Usually the same men worked together as a gang, though not always so, but the gangs were changed from place to place. They moved from one stage to another and from one part of the building to another. When a stage was lowered to the floor the painters would go to another stage which had been before that hung by the sailors, and the sailors would take the stage thus lowered to the floor to the proper place and hang it in position ready for use again.

The business and employment of the deceased was the same as that of each of the other painters working there. Each man had his own paint bucket and paint brush while at work. When work closed for the day these were all put together, and the next morning each man selected one for himself without regard to whether he had used it before. The kind and color of paint used was the same, character and kind of work was the same, and done in the same way, same kind of appliances were used, rigged in the same manner, the men worked the same hours, lunched together at the same time, received the same wages; they were employed by the same foreman "to work together," were under the same assistant foreman, their time was kept in the same manner by the same man, and they were members of the same body of workmen at work for the same employer in the same building at the same time, having one and the same object, and all working together with the same purpose to reach the same end.

The deceased and Lehigh, also Elisius, Olson and Matson, had all been at work there in the same manner and under the same circumstances and conditions for two months, and the deceased for more than that length of time.

The stage upon which deceased and Lehigh were working was next north of the one upon which Elisius, Olson and Matson were working. These two stages "at the time of the accident were hung right on the same line with one another, end to end." The "ties" at the south end of the deceased's stage and at the north end of the Elisius stage

were near together. Elisius attempted to untie the rope sustaining the north end of his stage, but by mistake he untied the rope sustaining the south end of the stage of deceased. The result was that the deceased and Lehigh were thrown to the floor and one was killed and the other more or less seriously injured.

Each one of these parties was familiar with the manner in which the stages were hung and lowered and hoisted, and their location and relation to each other. Sometimes they were used by the painters as a continuous scaffold in passing to and from lunch.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant; SAMUEL S. PAGE, of counsel.

Servants are fellow-servants when, first, they are usually associated in their daily duties; second, when they are co-operating in the particular work they are about. *C. & N. W. R. R. Co. v. Moranda*, 93 Ill. 302; *Rolling Mill Co. v. Johnson*, 114 Ill. 64; *C. & A. R. R. Co. v. Hoyt*, 122 Ill. 374; *C. & N. W. R. R. Co. v. Snyder*, 117 Ill. 388.

A servant assumes the risk of the negligence of fellow-servants. *T., W. & W. Ry. Co. v. Durkin*, 76 Ill. 397; *C., B. & Q. Ry. Co. v. Avery*, 109 Ill. 322; *Valtez v. O. & M. Ry. Co.*, 85 Ill. 500.

To constitute fellow-servants it is not necessary that they should be acquainted with each other. *C. & A. R. R. Co. v. Hoyt*, 16 Ill. App. 243; *Klees v. C. & E. I. R. R. Co.*, 68 Ill. App. 246.

Servants may be fellow-servants although their duties are dissimilar, provided the risk of injury from the negligence of the one is so much a natural consequence of the employment which the other accepts that it must be included in the risks which he is supposed to have considered in engaging in the employment. *Morgan v. Vale of Heath R. R. Co.*, L. R., 1 Q. B. 149; *Rapalje & Lawrence Dictionary*, 242.

N. A. KAUFMAN, attorney for appellee; CHURCH & MURDY and J. WARREN PEASE, of counsel.

MR. JUSTICE HORTON gave the above statement and delivered the opinion of the court.

The point is made by appellant that one of appellee's (plaintiff's) instructions was read and given to the jury, but was not marked either "Given" or "Refused." The case of *Calef v. Thomas*, 81 Ill. 478, 487, cited by counsel for appellant, is not in point. There, instructions which should have been, were not given to the jury, but they were not marked "Refused." The real error was in not giving them, and the court held that "the effect is precisely the same as if the instructions had been formally marked refused." The Supreme Court has, however, removed all doubt upon the question. In *Tobin v. People*, 101 Ill. 121, it is held that even in a criminal case, where the record shows that instructions were in fact given to the jury, the case will not be reversed because the trial court inadvertently failed to mark them "Given." Another and sufficient answer to this objection is that it is not specifically made either in the written motion for a new trial filed in the court below, or in the errors assigned in this court.

Appellee seeks to limit appellant to particular assignment of errors under the rule laid down in *C. E. Street Ry. Co. v. Van Pelt*, 68 Ill. App. 583. It is there held that where one of the reasons assigned in a written motion for a new trial filed in a cause was not mentioned in the argument of the motion in the trial court, that the matters stated in such reason can not be assigned for error in a court of appeal. We can not follow this ruling.

This question is very fully considered in *R. R. Co. v. McMath*, 91 Ill. 104, where it is held that under the present statute "only one copy of the reasons for a new trial is required, and that is to be filed with the papers so that both court and counsel may have access to it." Also, that it is sufficient if the bill of exceptions shows that the motion was made and overruled and an exception taken; also, that "if plaintiff in error had filed certain points in writing, particularly specifying the grounds of his motion, then he would, of course, be confined in the Appellate Court to the

reasons specified in the court below, and would be held to have waived all causes for new trial not set forth in his written grounds."

There is no intimation in that case that if plaintiff in error had filed a written motion he would be held to have waived all such points contained therein as were not read to the court below, and commented on by counsel upon the argument of the motion.

When it is held that a party will be considered to have waived all points not contained in his written motion, the converse must be considered as sustained, viz., that he has not waived any points which are contained therein. A party is not bound to read his motion to the court *in extenso*, or to comment upon each and every item thereof. Nor is he to be deemed to have waived those points not read or commented upon, provided he has not in some manner deceived the trial court, or otherwise waived such points. The following cases bear to a greater or less degree upon this question: Coal Co. v. Schaefer, 135 Ill. 217; Hintz v. Graupner, 138 Ill. 166; Bromley v. People, 150 Ill. 299; R. R. Co. v. Goff, 158 Ill. 455; Brewing Co. v. Boddie, 162 Ill. 346; R. R. Co. v. White, 166 Ill. 378; R. R. Co. v. Sanders, 66 Ill. App. 442.

Since writing the foregoing, the Supreme Court has handed down an opinion affirming the Van Pelt case, *ante*. It is there stated that the record shows that the Appellate Court "diligently examined the * * * things therein assigned as for error," and held that the opinion of the Appellate Court is no part of the record, and can not be resorted to by the Supreme Court to overcome the recitals in the record. It may, perhaps, be fairly inferred from the opinion of the Supreme Court, that the rule expressed in the opinion of the Appellate Court upon this point would not be sustained by that court.

It is claimed by appellant that Peter Bell assumed the risk of the negligence of his fellow-servants. In Ry. Co. v. Durkin, 76 Ill. 397, Mr. Justice Breese, in delivering the opinion of the court, said that when a person enters a par-

ticular service, "He thereby undertakes to run all the ordinary risks incident to the employment, * * * and this includes the risk of occasional negligence or unskillfulness of his fellow-servants engaged in the same line of duty, or incident thereto, provided such fellow-servants are competent and skillful to discharge the duty assigned them."

As stated by Mr. Justice Sheldon in *R. R. Co. v. Avery*, 109 Ill. 314, 322, "The negligence of fellow-servants is one of the ordinary perils of the service which one takes the hazard of in entering into any employment."

In *Valtez v. R. R. Co.*, 85 Ill. 502, the rule is stated thus: "Where the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow-servants within the rule."

There remains to be considered the important question whether Bell, Lehigh and Elisius were fellow-servants.

Counsel for appellee commence their argument upon this point with the statement that "It must, perhaps, be conceded, and indeed the court itself has said so in the *Moranda* case (93 Ill. 308), that in its consideration of the numerous cases which have come before it involving this question, the Supreme Court of this State has gradually evolved a rule, more stringent toward employers of labor than the courts of some other States have recognized."

As between employer and employe, the relation is mutual, and the duties, obligations and risks incident thereto are mutual. They may be working together in such manner that if both were in the employ of the same master they would be what the law styles "fellow-servants." This is not infrequently the case. Under such circumstances each owes to the other the same duty to so act that neither shall be injured by reason of want of proper care and diligence.

The law requires of every employer that he be vigilant and careful, and that he exercise every reasonable care and caution in the selection of co-employes and otherwise, for

the safety and protection of all persons employed by him. The law also requires of every employe that he be vigilant and careful, and that he exercise every reasonable care and caution in the performance of his duties. The duties and obligations, though greatly differing in extent, are reciprocal. Neither is insurer of the other against every injury which may result from any accident, when he is not guilty of any negligence or lack of proper care or caution.

The reason for the rule that a common carrier of persons for hire, is, practically, an insurer of the safety of passengers, does not exist in the case of employer and employe. Where neither employer nor employe is to any extent at fault, then, as between them, any injury or damage which may come to either by reason of the employment, must be held, in law, to be from an accident for which neither is liable to the other.

We must not be understood as intimating that the duties and obligations of employer and employe to each other are the same in extent. We are speaking now only of the principle upon which all such liability is predicated. Cases are rare where the employe would be liable to the employer, and are far too frequent where the employer is liable to the employe.

The opinions of the courts of this State were prepared with the rules here expressed in view, and must be interpreted and applied bearing the same in mind.

C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302, is a leading case in this State upon the question of who are fellow-servants. It is there stated (p. 313), that "the common law rule—whereby the master is made to answer for damage done to others by the neglect of his servant—is plainly unjust when applied to a case where the master has with due care employed a competent and careful servant and is himself guilty of no wrong. As a matter of strict justice, a man who himself has done no wrong, ought not as a mere matter of justice be compelled to answer for the negligence of another;" but they say that the rule of *respondeat superior*, although unjust to the master, rests upon considerations

of policy, and that "the well-being of society is best subserved thereby," and that "the rule is founded on the expediency of throwing the risk upon those who can best guard against it," and "if this be so, the liability of the master must turn upon the proper consideration in each class of cases of what ruling will, in fact, throw the risk upon those who can best guard against it;" that "the best interests of society demand that all business should at all times be so conducted that the least possible harm shall be caused thereby; that all servants, especially those controlling dangerous instrumentalities, shall constantly use due care."

It is also there held that the same considerations of policy, which, to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of fellow-servants.

The only ground upon which the Exposition Company can be held liable in this case, is that it is responsible for the carelessness of Elisius. He and the deceased had been working in the same line of work in the same building for two months or more. It does not appear whether they had before that day worked upon adjoining stages. That is not, however, a controlling fact. They had during that time worked upon stages next to other employes when not next to each other, and the rule announced in the *Moranda* case as to the influence of co-employes to promote in each other care and caution, has the same application to Elisius, whoever the employes may have been, from time to time, working upon the adjoining stages.

We shall not attempt a review of the numerous cases in Illinois courts bearing upon this question, but refer to *Rolling Mill Co. v. Johnson*, 114 Ill. 57; *C. & A. R. R. Co. v. Hoyt*, 122 Ill. 369; *R. R. Co. v. Swan*, 70 Ill. App. 331, 335.

It is urged by appellee, in effect, that personal acquaintance is necessary to constitute fellow-servants. Such is not the law. We quite agree with the Appellate Court, third District, when it says in *C. & A. R. R. Co. v. Hoyt*, 16 Ill.

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App. 237, 243 (affirmed in 122 Ill. 369): "We can not see what figure it cuts in the case whether or not appellee and the trainmen were unknown to each other, for if their relations in other respects were such as to constitute them fellow-servants, the fact of their acquaintance or non-acquaintance with each other is of no consequence."

A careful consideration of the facts in this case leads us irresistibly to the conclusion that Peter Bell and Elisius were fellow-servants at the time of the accident which resulted in the death of said Bell. We are not unmindful of the case of *Lehigh v. Exposition Co.*, 67 Ill. App. 27, which grew out of the same accident. Whether co-employees are fellow-servants, is a question of fact for the jury under proper instructions, as there held. That case was taken from the jury at the conclusion of plaintiff's testimony. In the case at bar, testimony was offered by the defendant below. A somewhat different state of facts is shown.

The judgment of the Circuit Court must be reversed. We do not see that any different state of facts can be presented upon another trial, and therefore the case is not remanded.

John V. Farwell Co. v. John Patterson.

1. EXEMPTIONS—*When a Debtor is Estopped to Claim.*—A person made a statement for the purpose of obtaining credit in which he knowingly and falsely stated that he was the owner of household furniture to the value of \$1,500. He afterward made an assignment for the benefit of his creditors, but failed to turn over to the assignee any of his household furniture. The assignee sold the entire assets for \$659.85, out of which the debtor petitioned for the allowance of \$400 as his exemptions under the statute. It was held that he was estopped by reason of his false statement from claiming his exemptions out of the proceeds of the assignment as against persons giving him credit upon his statement.

2. ESTOPPEL—*By False Representations.*—One who knowingly and for a fraudulent purpose makes a false representation to another, who does not know or have reason to know its falsity, for the purpose and intention of inducing him to act upon the representation in a manner he would not otherwise do, and thereby induces such other person to act upon it and part with property of value, is estopped from afterward

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denying the truth of his representation, to the injury of him who relied and acted upon the supposed truthfulness of the representation.

3. VOLUNTARY ASSIGNMENTS—*Administration of, by the Courts.*—The administration, by the courts, of assignments by insolvents for the benefit of creditors, being proceedings to enforce trusts, has always been held to be a matter of equitable jurisdiction governed by chancery rules; and the mere fact that there is a statute regulating assignments for the benefit of creditors, has not changed the jurisdiction or practice.

4. APPEALS—*In Chancery.*—It is not necessary, in chancery proceedings, that the person who appeals should be actually a party to the record, provided he has an interest in the question which may be affected by the decree or order appealed from.

5. PRESUMPTIONS—*As to Evidence Not Appearing in the Record—Chancery Proceedings.*—There is no presumption in chancery that evidence, not appearing in the record, was heard in the court below in support of a decree in favor of a complainant. The presumptions that exist in favor of a judgment at law being sustained by evidence heard but not preserved in the record, do not exist in favor of decrees upon bills in chancery.

6. EQUITY PRACTICE—*Preservation of Evidence to Support the Decree.*—The party in whose favor the decree granting relief is rendered, to maintain it must preserve the evidence, or the decree must find specific facts that were proved on the hearing. It is not the duty of the party against whom the decree is rendered to preserve the evidence.

7. SAME—*Where the Record Fails to Show Evidence to Support the Decree.*—Where, in chancery, the allegations of the bill are not confessed, but denied, the practice requires the evidence to be preserved in the record, and if it fails to show grounds granting the relief ordered by the decree, it must be reversed on appeal or writ of error.

8. SAME—*Evidence to be Preserved by the Party in Whose Favor the Decree is Rendered.*—Where the certificate of evidence does not contain all the evidence heard in the cause, it is the duty of the party in whose favor the decree is rendered to preserve what other evidence there may be in some appropriate manner.

Proceedings Under the Insolvent Act.—Appeal from an order allowing exemption to the assignor. Made by the County Court of Cook County; the Hon. C. H. DONNELLY, Judge, presiding. Heard in the Branch Appellate Court, First District, at the March term, 1898. Reversed and remanded. Opinion filed May 31, 1898.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for appellant.

A person who knowingly makes a false representation to another, with the intention that the party to whom the representation is made will act upon it, and thereby induces

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that party to act upon it and part with something of value, will be estopped from afterward denying the truth of the representation to the injury of the party relying and acting upon the truth of the representation. See Bigelow on Estoppel, page 484, and Hefner v. Vandolah, 57 Ill. 520.

In the case of Stevens v. Ludlum, 46 Minn. 160, it was held that representations respecting one's business by a debtor, estop him as against the person acting upon the truth of such representations, from denying their truth.

It has been held that a person who holds himself out as doing business as a partnership, composed of himself and son, is estopped from claiming that he was doing business as an individual, so as to entitle him, as against a creditor, to exemptions in property invested in business. Green v. Taylor, 32 S. W. 945.

MICHAEL McMAHON and FRANK E. NEWBERRY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

The appellee, being a retail merchant in Chicago, applied on June 1, 1896, to the appellant corporation, a wholesale merchant, to purchase from it goods on credit, and as a basis for the credit asked, made and delivered to appellant a written statement of his financial condition.

Such statement showed, in detail, assets aggregating the value of \$7,600, including his household furniture valued at \$1,500. His total debts were stated to amount to not exceeding \$115, not due for merchandise. Upon the strength and faith of the representations so made, the appellee was given credit by the appellant to the amount of \$245.05.

Six months after the written statement was made by appellee, and on November 30, 1896, he made and filed in the County Court his deed of assignment under the voluntary assignment act.

The assignee qualified, took possession and filed his

inventory, footing up \$1,131.19 in value, but did not take possession of or inventory the household furniture. Under the order of the County Court the assignee continued the business of appellee for ten days, and then sold the balance of the stock in bulk—the gross sum received by the assignee for the whole of the assigned estate being \$659.35.

The deed of assignment purported to convey to the assignee all of appellee's property and effects, "except such as may be exempt to him by the laws of the State of Illinois."

On January 20, 1897, the appellee filed his petition in the County Court, setting forth the making of the assignment; that the assignee took possession of and sold all of the goods, chattels and effects belonging to appellee; that appellee was head of a family, and resided with the same; that he had not received or been paid any part of his claim for exemptions under the law, and that he was entitled to receive out of the proceeds of such sale by the assignee the sum of \$400, which he prayed might be allowed and paid to him out of the cash remaining in the assignee's hands. No schedule and no appraisement or selection, as provided by the exemption act, was ever had or made by the appellee, although he did, shortly after making his deed of assignment, file with the assignee an affidavit in the nature of a claim of exemption, which, however, was never acted upon, because, as appellee testified, there would have been nothing left but job lots, and he was advised the property would bring more if sold together.

The appellant answered the petition, setting up, in substance, the facts above stated as to the application for credit, and making of his financial statement by appellee, and the reliance thereon by appellant; that appellee did not turn over to the assignee all his personal property, but retained in his possession an amount thereof, including said household furniture, largely in excess of all exemptions to which appellee was entitled by law, and that now appellee claims he never owned said household furniture; that appellee never complied with the provisions of law requisite and

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necessary in asserting a claim for exemptions, and that by reason of all such matters the appellee is not entitled to have, and is estopped from asserting, any right to claim exemptions from the money in the assignee's hands.

The County Court, however, after hearing evidence, allowed the petition of appellee, and ordered that the assignee pay to appellee, out of the funds in his hands, the sum of four hundred dollars as his exemptions; and it is from that order that this appeal is prosecuted.

The record, therefore, presents the case of an insolvent debtor now saying and proving that a statement made by him for the purpose of procuring credit granted to him upon the faith of such statement, was false, and known by him to be false at the time he made it, and seeking to recover, directly from his assignee but indirectly from the creditor whom he cheated, money, as and in place of his statutory exemptions, while retaining possession, as much as he ever had, of the very property which he falsely represented to be his own, far exceeding in value any exemption which the law would give him in any case. The bad morals of allowing such a claim in favor of one so dishonest, is manifest, and we think it is not less bad in law.

One who knowingly and for a fraudulent purpose makes a false representation to another, who does not know or have reason to know its falsity, for the purpose and intention of inducing the other to act upon the representation in a manner he would not otherwise do, and thereby does induce such other person to act upon it and part with property of value, is estopped from afterward denying the truth of his representation to the injury of him who relied and acted upon the supposed truthfulness of the representation. *Bigelow on Estoppel* (5th Ed.), Chap. 18; *Hefner v. Vandolah*, 57 Ill. 520; *Hill v. Blackwelder*, 113 Ill. 283; *Robbins v. Moore*, 129 Ill. 30. The evidence conclusively shows that the written statement was made by appellee for the purpose of procuring goods and credit from appellant; that appellant believed the representation to be true, and acted upon it, as it would not have otherwise done, by giving goods and credit to appellee, and that appellee knew

and appellant did not know, or have reason to know the representation made by him was false at the time he made it. No element is lacking to require application of the rule of estoppel against the appellee, and a plainer duty to enforce it is seldom met with. It is also shown by the testimony of appellee that the household furniture falsely represented by him to be his own was then and is now the property of his wife, and was at the time of the trial worth one thousand dollars, or two and a half times the value of his claimed exemptions.

It was expressly testified by the credit man of appellant that he relied particularly upon the item of \$1,500 for household furniture in the statement, to cover appellee's exemptions in the case of his failure, and as already said, the statement in such regard was admittedly false.

If that statement had been true, appellee would have turned over to his assignee at least \$1,000 worth of property that never came to the assignee's hands, which of itself makes a case of injury to appellant because of the false statement; and such injury is added to by appellee now having allowed to him \$400 in money out of the proceeds of his stock in trade, consisting, quite probably, in part of the very goods fraudulently obtained by appellee from the appellant.

Appellee has filed two motions, which remain to be considered—one to dismiss this appeal and the other to strike the original bill of exceptions or certificate of evidence from the files.

Several grounds for the dismissal of the appeal are stated, but the only one urged goes to a denial of the right of appellant to have an appeal, and it is said that the assignee is the only one who could have appealed; that he was the only party against whom a final judgment was rendered.

The administration by the courts of assignments by insolvents for the benefit of creditors, being proceedings to enforce trusts—a subject peculiarly within the province of a court of equity—has always been held to be a matter of equitable jurisdiction governed by chancery rules; and the mere fact that we have a statute relating to and regulating

voluntary assignments for the benefit of creditors, has not changed the jurisdiction or practice concerning them. In other words, such proceedings in the County Courts are not statutory, but are chancery proceedings modified and regulated by statute. *Union Trust Company v. Trumbull*, 137 Ill. 146; *Howell v. Moores*, 127 Ill. 67; *Farwell v. Cohen*, 138 Ill. 216.

The right of appellant to maintain his appeal must therefore be determined by the application of chancery rules.

Appellant obtained an allowance of its claim by the County Court against the estate, and appeared and answered the petition of appellee and contested it, and it is plain that appellant had an interest in the fund in the hands of the assignee. We can see no good reason why it should not maintain its appeal from an order which so manifestly affected its interest.

“It is not necessary, in chancery, that the person who appeals should be actually a party to the record, provided he has an interest in the question which may be affected by the decree or order appealed from; and even creditors coming in before the master under a decree have been held entitled to appeal, although not parties to the bill, because the decree affected their interests; and a creditor coming in before a master and having a claim disallowed on exceptions to the report, may appeal from the order disallowing the exceptions.” *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; see also *Phillips v. Blatchford*, 26 Ill. App. 606; *Ill. T. & S. Bk. v. Robbins*, 38 Ill. App. 575.

The second motion is to strike the original certificate of evidence from the record, because, for the reason, as is said, it does not appear that appellee or anybody for him, stipulated that the original might be used upon appeal in lieu of a copy.

An inspection of the signatures to the original stipulation accompanying the transcript satisfies us that the motion is entitled to be considered as frivolous. It is signed “James R. Ward, attorney for assignee & John Patterson.” The “&” is quite as distinct as any other part of the signature, and is incapable of being read “of,” as contended.

The further reason urged by appellee for striking out the certificate of evidence, is that it nowhere appears in the record that the certificate of evidence contains all the evidence heard by the trial court.

The resultant force of allowing the motion for such a reason would be a recoil upon appellee, which he does not appear to apprehend. There is no presumption in chancery that evidence, not appearing in the record, was heard in the court below in support of a decree in favor of a complainant. The presumptions that exist in favor of a judgment at law being sustained by evidence heard but not preserved in the record, do not exist in favor of decrees upon bills in chancery. "The rule has been often stated by this court that facts by which a decree in equity is based must appear somewhere in the record." *Forth v. Town of Xenia*, 54 Ill. 210.

The decree, or order, appealed from, recites that the cause came on to be heard upon the petition of appellee, and upon the amended answer of appellant, and that evidence was heard, but there is no finding of any fact, not even a general finding that all the material facts charged in the petition are true. Where a decree in chancery makes no finding, by recital or otherwise, of facts sufficient to warrant the relief granted, and the evidence upon which the decree is predicated is not otherwise preserved, either in a master's report or depositions, or exhibits, or in some other way, already in the record, the party seeking to sustain the decree in his favor must preserve the evidence in a certificate under the hand and seal of the judge who heard the cause. It is a *sine qua non* that the facts appear somewhere in the record, and we may not presume that any evidence was given in the court below except what the decree recites, or is otherwise made to appear. *Moss v. McCall*, 75 Ill. 190; *Jackson v. Sackett*, 146 Ill. 646; *Glos v. Beckman*, 168 Ill. 75; *Bonnell v. Lewis*, 3 Ill. App. 283; *Drennan v. Huskey*, 31 Ill. App. 208; *Becker v. Becker*, 15 Ill. App. 247; *Wistar v. Herting*, 27 Ill. App. 443.

"The party in whose favor the decree granting relief is

rendered, to maintain it, must preserve the evidence, or the decree must find specific facts that were proved on the hearing. It is not the duty of the party against whom the decree granting relief is rendered to preserve the evidence, as appellee's counsel seem to suppose." *Marvin v. Collins*, 98 Ill. 510.

Where, in chancery, the allegations of the bill are not confessed, but are denied, "the practice requires the evidence to be preserved in the record, and if it fails to show grounds granting the relief ordered by the decree, it must be reversed on appeal or writ of error." *James v. Bushnell*, 28 Ill. 158.

An order dismissing a petition in a chancery cause will be sustained upon appeal where there is an absence, either in whole or in part, of the evidence from the record, "since that is the proper decree in case there is no evidence, or if the evidence is insufficient to authorize the relief asked for." *First Nat. Bk. v. Baker*, 161 Ill. 281; *Jackson v. Sackett*, 146 Ill. 646.

If it be true, as a matter of fact, that the certificate of evidence embodied in this record does not contain all the evidence heard in the cause, it was the duty of appellee, as the party in whose favor the decree was, to preserve whatever other evidence there was, in some appropriate manner, if he would sustain his decree, and failing to do so, he may not complain of his own omission, as a reason for upholding the relief granted to him.

As was held in *Brooks v. Martin*, 64 Ill. 389, we will, under such circumstances, look, as we have done, to the evidence that is certified to us, and will not infer the court heard other evidence, although the certificate of the judge fails to state no other evidence was heard, and so examining the evidence, reverse the order upon the merits, upon the ground of estoppel by conduct of appellee, rather than because of the failure of appellee to have it made to appear that the certificate contains all the evidence, although the latter ground would be sufficient.

The order of the County Court is reversed and the cause remanded.

John McGregor v. Reid, Murdoch & Co.

1. **MASTER AND SERVANT.—***Care in the Construction and Operation of Elevators.*—An employer is bound to exercise great care and caution, both in the construction and operation of an elevator, but the law does not require him to guarantee to his employes the prudence, skill and fidelity of those from whom he obtains the machinery and appliances, or the strength and fitness of the material they have used.

2. **SAME—***Injuries Occasioned by Defective Elevators.*—Where a person sues for personal injuries received by the falling of an elevator, the question is not as to whether the elevator was or was not defective when the accident occurred, but whether the appellee was guilty of a neglect of duty creating a liability for the injury; and if the whole evidence, that of the plaintiff and that of the defendant, raises no issue of fact upon the question, there can be no controversy of fact for the jury to determine. The question of liability is one of law for the court.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

STATEMENT.

This is an action to recover for personal injuries received by appellant while in the employ of appellee, a corporation. His duties required him to receive merchandise as it came in to the appellee's store, and take it up in an elevator to the place where such merchandise was to be kept. He had been so engaged about a year. In November, 1894, while riding up in the elevator with a truck load weighing less than a thousand pounds, the elevator dropped from about the height of the third floor, injuring appellant. The accident appears to have been caused by the pulling out of the two wire cables from their socket attachments. These had been put in some time in April preceding. The work was done by a firm of good standing in that line of business. The car was equipped with safety appliances intended to prevent the elevator from dropping should the cables part or give way. These appliances consisted of "dogs" set by a spring for the purpose of releasing a lever in order to set the teeth of the dogs into the side of the elevator slide.

McGregor v. Reid, Murdoch & Co.

These dogs failed to work because, it is said, there was too much play on each side of the car to enable the teeth to catch. The elevator was regularly inspected twice a year by the city, and four times a year by experts employed at the instance of appellee. It had been inspected three times after the new cables were put in, and prior to the accident.

WING, CHADBOURNE & LEACH, attorneys for appellant.

WALKER & EDDY, attorneys for appellee.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

At the conclusion of the plaintiff's case, the defense introduced evidence tending to show that the elevator in question had been frequently inspected previous to the accident by parties who were engaged in that business, and it appeared from the testimony introduced on the part of the plaintiff that the new cables had been put in immediately after, and because an inspector had condemned the old ones formerly in use. This work was done under contract by a firm regularly engaged in that line of business, and the testimony of one of plaintiff's witnesses is that it is "a large firm with a good reputation." It appears that the cables pulled out of their sockets because of some imperfection in the workmanship. But the witness says there was no way of discovering this imperfection after the cables were put in.

There is no controversy over the material facts. Appellee employed parties whom it had every reason to suppose were competent in every way to put in the cables. It had made use of the best safety appliances. It had procured frequent inspections to be made by experts in addition to the inspections made by city officials. Appellee was bound to exercise great care and caution both in the construction and operation of the elevator, but the law did not require it to guarantee to its employes the prudence, skill and fidelity of those from whom it obtained the machinery and appliances, or the strength and fitness of the material they used. (See Cooley on Torts, p. 567.) If appellee has used a very high

degree of care in providing the machinery and appliances for this elevator, it is not liable. *Allerton Packing Co. v. Egan*, 86 Ill. 253.

It will be seen that appellee did not undertake in this case to manufacture or erect this elevator with workmen acting under its direction. It employed independent contractors, both to put in the cables and also for inspection. No inspection made by itself or its own employes would, according to the testimony on the part of the plaintiff, have revealed the defect in the method of putting the cables in the sockets. No knowledge whatever of the defect on the part of the appellee appears in evidence. Under these circumstances it is difficult to find any ground of liability. *Devlin v. Smith*, 89 N. Y. 470.

It is said the trial court erred in directing the jury to find a verdict for appellee, and appellant urges that in considering whether this was proper or not, this court must disregard all of the appellee's evidence, and must ignore the inspection certificates introduced by the defense.

Appellant's counsel concedes that appellee was not an insurer of this machinery, but says that the proof of the falling of the elevator makes out a *prima facie* case, which should have gone to the jury, allowing the appellee "to prove, if it could, that the accident was not its fault."

The question is not as to whether the elevator was or was not defective, and hence the accident occurred, but it is whether the appellee was guilty of any neglect of duty creating liability for the injury; and if the whole evidence, that of the plaintiff and that of the defendant, raises no issue of fact upon that question, then there was no controversy of fact for the jury to determine, and the question of liability was one of law for the court. *Ambler v. Whipple*, 139 Ill. 311-322.

The evidence of the inspection certificates was corroborative, not contradictory, of testimony given on the part of the appellant.

No error was committed in directing the jury to find appellee not guilty, and the judgment of the Superior Court is affirmed.

Lake Shore and M. S. Ry. Co. v. William Kelsey, by His
Next Friend.

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1. NEGLIGENCE—*Standing on the Steps of Railway Cars.*—Standing on the steps of a railway car when the train is in motion, although *prima facie* evidence of negligence, is not negligence under all circumstances, *per se*, and as a matter of law. Nevertheless, riding on the lower step of the platform of an ordinary railway train going at a high rate of speed would doubtless be regarded as gross negligence in a passenger, unless some good reason appeared for so doing other than voluntary choice. But whether it is negligence or not is a conclusion of fact from the circumstances.

2. SAME—*A Question for the Jury.*—It is a fair question for the jury whether, under circumstances in evidence, a passenger was or was not guilty of contributory negligence. If the conduct of the party, whose duty it is to use due care, is so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent, then the court may so pronounce and so instruct the jury.

3. RAILROADS—*Rules, When Binding upon Passengers.*—A regulation of a railroad company which is reasonable and proper, is binding upon a passenger when he has notice of it, or the circumstances are such that he ought to have had such notice, and it should be obeyed so far as the conditions will permit.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

STATEMENT.

This is a suit to recover for personal injury. Appellee, a boy fifteen years of age, while riding on the lower step of the platform of a passenger coach belonging to appellant, over the tracks of the Union Stock Yard & Transit Company, was struck by a car standing upon a side track, thrown from the train and injured. He was holding on to the iron railing of the platform, and standing with his back toward the car by which he was struck. It was contended by appellant that the boy was stealing a ride. The jury, in answer to a special question, however, found otherwise. He

had not, up to the time of the accident, paid any fare, but testified that he was ready to do so. The train was run for the convenience of workmen employed at the Stock Yards. There is conflict in the testimony as to whether the platform and the car were or were not crowded, but the jury found specially that there was no room on the platform of the car for the plaintiff to stand. There is testimony tending to show that the car by which the boy was struck, was standing upon a side track, which gradually approached and ran into the main track at a point near where the accident occurred. The cars did not come into actual contact with each other, but there is conflict in the testimony as to the width of the intervening space. The jury found in favor of appellee, and judgment was rendered accordingly.

PAM, DONNELLY & GLENNON, attorneys for appellant.

W. A. HAMILTON, attorney for appellee.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

Appellant seeks a reversal of this judgment, chiefly upon the ground that the boy, as it is claimed, was not exercising due care for his own safety, first, because he was standing on the lowest step of the car platform holding on to the railing, with his back to the side track in question; and, second, because his head and body were projecting beyond the outer side of the coach upon which he was riding.

The train was operated for the accommodation of workmen. It made thirteen stops between Van Buren street and its terminal station. Its rate of speed was about seven miles an hour. In these respects it differed materially from an ordinary railway train running at full speed and for longer distances, to which a stricter rule as to the exercise of due care would be applicable. *North Chicago St. Ry. Co. v. Williams*, 140 Ill. 275, 282.

Standing on the steps of a railway car when the train is in motion, although *prima facie* evidence of negligence, is

not negligence under all circumstances, *per se*, and as a matter of law. *Chicago & A. R. R. Co. v. Fisher*, 141 Ill. 614, 627, and cases there cited.

Nevertheless riding on the lower step of the platform of an ordinary railway train going at a high rate of speed would doubtless be regarded as gross negligence in a passenger, unless some good reason appears for so doing other than voluntary choice. But whether it is negligence or not is a conclusion of fact from the circumstances. In the present case there is testimony tending to show that the platform was crowded when the boy boarded the car at Forty-seventh street, and the jury specially found that there was no room for him to stand on the platform, in other words, that he may have been there from necessity. The accident occurred at Forty-fifth street. He had ridden, therefore, about two blocks in this position before he was injured. We can not say that the jury were not justified in finding that the boy had been unable to get upon the platform, and that under these circumstances he was not guilty of negligence in that respect.

But it is urged that if there was contributory negligence in no other way, there certainly was such negligence when the boy projected his body outside of the line of the coach upon which he was riding.

It is claimed on the part of appellant that the space between the moving coach and the car by which the boy was struck was something like a foot and a half in width. This was testified to as an estimate or opinion, but not as a positive fact based upon measurements or actual knowledge. The jury were at liberty to reach their own conclusions as to the correctness of this estimate, and we do not regard its correctness as proven. On the contrary, there is evidence of facts and circumstances tending to disprove the claim that the space in question was so wide. In the case of *North Chicago St. R. R. Co. v. Williams*, above referred to, it is said that where a railroad company places its tracks so near an obstruction which it is necessary for its cars to pass, that its passengers while riding are in danger of being

injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence. In the present case the negligence of the company in this respect is not seriously controverted. It is in like manner a fair question for the jury whether, under the circumstances in evidence, the passenger was or was not guilty of contributory negligence. If the conduct of the party whose duty it is to use due care "is so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent," then the court may so pronounce and so instruct the jury. *Hoehn v. Chicago, P. & St. L. Ry. Co.*, 152 Ill. 223-229, and cases cited.

In the present case we can not say that the boy who was injured was so palpably negligent. If it be true that, having got on the train but a few moments before, he had been unable to get upon the platform because of the number of persons in advance of him, and that holding on to the railing he inadvertently projected his body beyond the line of the coach and was struck by a car negligently left standing upon a side track near its junction with the track upon which he was riding, and was thus injured, it is, we think, a question for the jury whether, under the circumstances, he was or was not in the exercise of due and proper care, such as would prevent him from maintaining the action, and by their verdict they have determined the question in favor of the appellee. That they were unable to determine from the evidence whether there was standing room in the aisles of the coach upon which the boy was riding, or whether there were vacant seats in the other cars, is in no way inconsistent with such finding.

Objection is made to the first instruction given at the instance of appellee's counsel, that it assumes the existence of a disputed fact, namely, that appellee was a passenger. The objection is, we think, unfounded. No such assumption appears in the instruction; and as to the disputed fact the jury found in answer to a special interrogatory that the boy was not on the train with the intention of stealing a ride.

Lonergan v. Kinsella Glass Co.

Other instructions are objected to, but we find no material error in the action of the trial court in giving or refusing them. They state with substantial correctness the law applicable to the evidence. A regulation of the company which is reasonable and proper is binding upon a passenger when the latter has notice of it, or the circumstances are such that he ought to have such notice, and it should be obeyed so far as the conditions permit.

Our attention is called to certain alleged errors in excluding testimony offered on behalf of appellee. Some of this evidence was clearly admissible, but inasmuch as appellee does not complain of the result of the trial, it is not necessary to state at length the reasons for so holding.

The judgment of the Circuit Court is affirmed.

William Lonergan v. Kinsella Glass Co.

1. VERDICT—*Upon Conflicting Evidence*.—Verdicts of juries as to where the truth lies in cases of conflicting evidence must stand.

Assumpsit, for merchandise sold and delivered. Trial in the Superior Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

MILFORD J. THOMPSON, attorney for appellant.

KNECHT, BULLARD & ROBLIN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This was a suit brought by appellee to recover from appellant for a bill of glass furnished and set in a house being constructed by a contractor for the appellant. The contention was whether the glass was furnished upon the

agreement of appellant to pay for it, and if he promised to pay for it, whether such promise was an independent and original one, or was collateral to the promise of the contractor, and therefore a promise to pay the debt of another, and within the statute of frauds and void because not made in writing.

It can not be questioned but that the contractor ordered the glass in the first instance. There was, however, a clear conflict in the evidence whether the glass was furnished under that order, and as to what occurred and was said between the parties to the suit as to whom only credit would be given, and by whom payment would be made, and upon such evidence the jury found in favor of appellee and awarded to it a verdict for the amount claimed.

It is not enough for us to say that the evidence preponderated the other way, for verdicts of juries as to where the truth lies in cases of conflicting evidence must stand, unless from the whole case we can say there was no evidence to sustain the verdict, or it was so manifestly against the weight of evidence as to make it clearly wrong and unjust. *Elguth v. Grueszka*, 75 Ill. App. 281.

The same evidence upon which the finding that the promise was made by appellee, being sufficient to support such finding, must also be regarded as sufficient to support the other finding, that the promise was an original one, and not within the statute of frauds.

There can be no question as to what the law is, with the fact established that the promise was an original one and not collateral to the undertaking of another, and we will not cite authorities or discuss the question.

The facts were found against the appellant by the arbiter appointed under the law to settle such controversies, and the verdict and judgment must stand.

Parsons v. Kemper.

W. R. Parsons v. Arthur L. Kemper.

1. **VERDICTS—*On Conflicting Evidence.***—A verdict rendered upon a conflict of evidence will not be set aside unless, from an inspection of the record, the court can say that there is no evidence to sustain it, or that it is so manifestly against the weight of the evidence as to make it clearly wrong and unjust.

Assumpsit, for commissions. Trial in the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Verdict and judgment for plaintiff. Defendant appeals. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

DAVID G. ROBERTSON, attorney for appellant.

W. N. GEMMILL, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This appeal is from a judgment recovered by appellee for commissions claimed to be due him for negotiating a loan to appellant from a party who, it is claimed, was willing and able to make the loan, which was, however, never in fact consummated.

The application was for a loan of three thousand dollars. The acceptance, if any, of the application, was for a loan of twenty-two hundred and fifty dollars, and the judgment was for a commission of two and a half per cent on that sum.

Appellant's contentions are confined to two points. First, that the verdict and judgment were contrary to the law and the evidence; and second, that the court improperly instructed the jury.

Whether from the evidence the facts were correctly found, or not, is a matter upon which we might differ with the jury as an original proposition, but with the evidence so conflicting and inconsistent as the record here shows, and

with no appearance of passion or prejudice on the part of the jury, we should not substitute ourselves for the jury and destroy their verdict, unless from an inspection of the record we may say there was no evidence to sustain the verdict, or it was so manifestly against the weight of the evidence as to make it clearly wrong and unjust. *Elguth v. Grueszka*, 75 Ill. App. 281.

Applying this rule, and taking the facts as found by the jury, there can be no question that the law sanctions the verdict.

There were two instructions given on behalf of the plaintiff, as follows:

“The jury are instructed that if you find from the evidence that the plaintiff in this case was a duly licensed broker, in the city of Chicago, at the time when stated in his evidence, and if you further find that the defendant made application to the plaintiff for a loan and the plaintiff introduced him to one who had the money to loan, and who was ready, willing and able to loan it, and who offered to loan it, then you are instructed that notwithstanding the loan was not accepted for the amount originally asked by the defendant of the plaintiff, yet if the defendant agreed to accept a less amount from the party to whom he was introduced by the plaintiff, then the plaintiff had fulfilled his duty as such broker and is entitled to his commissions, and your verdict should be for the plaintiff.”

“The jury are instructed that if you believe from the evidence in this case that through the instrumentality of the plaintiff herein, the defendant was introduced to one ——— Merrill, who was ready and willing and able, and offered to make the loan to the defendant, upon terms acceptable, and agreed to by the defendant, but that the defendant after having so accepted the terms, afterward declined to accept the loan, then you are instructed that if you find that the plaintiff was a regularly licensed broker he is entitled to his commission and your verdict should be for him.”

We have carefully considered the argument of appellant's

North Chicago St. R. R. Co. v. Conway.

counsel against such instructions, but fail to agree with him upon his deductions. It is not necessary for a plaintiff to state in the instructions asked by him the defense of the other side.

Had appellant desired to have the jury instructed especially upon the point of whether his agreement or understanding with appellee precluded the latter from charging him a commission, he might have asked for an appropriate instruction upon that point, but he did not do so. There was evidence tending to show an agreement or understanding to that effect, and we will not assume that such evidence, as well as that opposed to it, was not considered by the jury. They should and presumptively did consider it in the absence of any instruction.

We discover no material error in the record, and the judgment will have to be affirmed.

North Chicago Street R. R. Co. v. Patrick Conway.

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| 76 | 621 |
| 80 | 308 |
| 76 | 621 |
| 100 | 1396 |

1. MASTER AND SERVANT—*Risks of the Service—When Assumed by the Servant.*—When a servant is temporarily engaged in more hazardous work than that for which he is employed, he takes upon himself all such risks incident to the work as are equally open to the observation of himself and the master.

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| 76 | 621 |
| 105 | 1599 |

2. ACCIDENTS—*In Personal Injury Cases.*—The mere fact that an accident occurs and a person is injured thereby does not of itself entitle him to recover in an action for personal injuries received, nor does it prove that the injury was caused by the negligence of the defendant in the action, nor does it relieve the person injured of the burden of making out his case.

3. ORDINARY CARE—*Defined—A Question of Fact.*—Ordinary care is defined as being that care which a reasonably prudent and cautious person would take to avoid injury under like circumstances, and whether the plaintiff was exercising such care is a question of fact.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Reversed and remanded. Opinion filed June 21, 1898.

STATEMENT.

This is an action for personal injuries. Appellee was injured while coupling a car known as a "trailer" to a motor car operated by electricity. The motor was standing still at the time, and the trailer was drawn to it by a single horse, with a view of coupling the cars together. When the two were a short distance apart the horse was detached and the trailer gradually approached the motor, its speed regulated by the conductor standing upon its platform with his hand upon the brake. Appellee seized the draw bars of each car, but says he was unable to raise that of the motor car because a hook had got into the opening above it in such a manner as to prevent. Consequently the cars came together and he was caught between the dash boards and injured. He recovered in the trial court and the company appeals.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

It is claimed that appellee is entitled to recover, because it is said he was ordered to do work outside of his regular employment, without warning of its dangerous character; that the position of the hook was the immediate cause of the accident, and that it was placed in this position by one of appellant's servants, not a fellow-servant of appellee, and that the latter was in the exercise of ordinary care.

Whether the work of coupling was in fact outside of his regular employment is to be determined by the evidence. Appellee himself testifies upon that point, substantially, that he had been working for the company about a year and a half; that he worked as a laborer about three months, and at the expiration of that time was put on the monthly list as an oiler, and so continued for about a year and two

or three months, and until the time of the accident. On cross-examination he states that the first coupling he did was about two weeks before he got hurt. He says that when one of the couplers was absent one of the oilers took his place, but whether this was done without orders or not he does not know; that he has seen some of the oilers coupling; that when he was hurt he was coupling three days, and was hurt on the third day. He testifies that this was the third occasion when he had been taken from oiling and set to work coupling in the place of an absent coupler, and that the intervals between the arrival of cars to be coupled was from three to ten minutes throughout the day. A question put to him with reference to the custom was this: "Is it not true that whenever an employe was absent on any account, that one of the oilers took his place?" Appellee's answer was, "Yes, sir, but I don't know whether they got orders or not." And he further said, "There was some of them used to couple. I have seen some of them coupling," in answer to the question whether it was usual for the oilers to do so.

The testimony of other oilers employed by appellant was to the effect that it was the custom of the oilers to take the place of a coupler, whenever the latter was absent for any cause, and that no one else was assigned to that duty.

It is said by appellee that under this evidence it was still a question for the jury whether the work of coupling cars was outside of the regular employment of the appellee. An instruction was given at the request of appellee's counsel submitting this question to the jury, and appellant insists that there was no evidence upon which such an instruction could be based. There was no contradiction as to the facts in reference to this matter, and no question of fact for the jury to determine. Appellant's witnesses assert and appellee does not deny, but practically concedes that it was the custom for such of the oilers as might be assigned or directed to do so, to assume the duty of the couplers in the absence of the latter. He himself admits that he had done so on two previous occasions, and at the time he was hurt

he had been working as a coupler nearly three days. If this was the custom for the oilers, and it was known to the appellee to be such, then he undertook the coupler's work, when so ordered, as a part of his employment; and it was at least unnecessary to submit the question to the jury as if the facts were in dispute. Moreover, we can not assume that the jury intended by their verdict to find an undisputed fact contrary to all the evidence.

It is said that appellee had no warning of the danger of his employment as coupler. Here again there was no evidence tending to show any dangers, not as obvious to appellee as to the company. There was no complicated machinery and no defect in any of the appliances for coupling. It is not claimed that there was. Assuming that the hook was in fact caught in the opening above the draw bar, as appellee testifies, and disregarding entirely the preponderating testimony to the contrary, it is yet manifest that this was not owing to any defect in the appliances, and was not a concealed danger involving risk, of which appellee with ordinary care should not have known. The position of the hook and chain, if actually caught in the draw-bar, was obvious to a cursory examination, such as an ordinarily prudent man, handling the draw bar and about to raise it, can not be excused for not making.

"Where a servant is temporarily engaged in more hazardous work than that for which he is employed, he takes upon himself all such risks incident to the work as are equally open to the observation of himself and the master." Consolidated Coal Co. v. Haenni, 146 Ill. 614, 625.

Dangers which may be readily seen by common observation the servant assumes the risk of. Swift & Co. v. Fue, 66 Ill. App. 657.

It is claimed by appellee that the position of the hook was the cause of the accident, and that it was placed in an improper position above the draw-bar by one of the appellant's servants not a fellow-servant of appellee.

If appellee was not in fact engaged in work outside of his employment, then the employes with whom he was working were fellow-servants if they were directly co-oper-

ating with him in the particular work in which they were engaged. *Rolling Mill v. Johnson*, 114 Ill. 57-64.

But we can find no evidence in this record tending to show that any other employe, whether fellow-servant or otherwise, placed the hook over the draw-bar. It is said by appellee's counsel that the person who uncoupled the brake chains must have put it in this position; that it is evident that it did not get in this position by chance. But the testimony of appellee is: "I ran back to catch the car that was coming in from Center street, and in doing so the link—not the link, but the hook—doubled back in the pocket over the draw-bar, and as the incoming car was coming in, I reached and caught a draw-bar, and when I tried to lift the other one I could not; the link was right over the draw-bar in the pocket and I could not lift it." This is appellee's explanation as to when and how the hook got into the pocket; and so far as it explains the matter at all, it seems to indicate that he knew all about the position of the hook before it "doubled back into the pocket;" but the testimony is silent as to who put the hook in that position, if it was in fact there at all.

Testimony offered by appellant is to the effect that the hook was not on the top of the draw-bar, and was not the cause of the accident. We can not agree with appellee's counsel that if this testimony is correct, "then appellee's inability to make the coupling was due to other causes, which the evidence does not show he could have discovered, and which would entitle him to recover," there being no evidence whatever of such other causes. The mere fact that an accident occurred and that appellee was thereby injured, does not of itself entitle him to recover, nor does it prove that the injury was caused by the negligence of the company, and it does not relieve the plaintiff of the burden of making out his own case. *I. C. R. R. Co. v. Cragin*, 71 Ill. 177.

Appellant urges that appellee failed to prove himself in the exercise of ordinary care at the time of the accident, and that this was a material allegation requiring proof.

Whether appellee was exercising ordinary care is a question of fact. Ordinary care is defined as being that care which a reasonably prudent and cautious person would take to avoid injury under like circumstances. *Chicago City Ry. Co. v. Dinsmore*, 162 Ill. 658.

While the burden is on the plaintiff to show due care, yet if the facts and circumstances attending the injury show negligence in the defendant, and do not show any contributory negligence in the plaintiff, a *prima facie* case will be regarded as made out. *Ill. C. R. R. Co. v. Nowicki*, 146 Ill. 29.

We do not regard the facts and circumstances presented in this case as making out a case of negligence against the appellant.

The court was asked to instruct the jury to find the defendant not guilty, and refused. For the reasons indicated, we think the instruction should have been given.

The judgment of the trial court is reversed and the cause remanded.

Charles S. MacCarty v. Mary E. Springer.

1. **ABSTRACT—*Must be Sufficiently Full.***—An abstract must, as against the appellant, be sufficiently full to present all the errors upon which he relies.

Bill to Foreclose a Trust Deed.—Trial in the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed May 31, 1898.

JAMES T. MAHER, attorney for appellant.

M. L. RAFTREE, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court. In this case the assignment of errors is as follows:

MacCarty v. Springer.

“ 1. The court erred in confirming the master's report.

“ 2. The court erred in entering decree against Charles S. MacCarty, in manner and form as provided in said decree, as said decree is contrary to the law and the evidence.”

The so-called “abstract of record” filed in this case, does not give the master's report. The only statement as to it is this :

“ Report and supplemental report of master filed February 19, A. D. 1896, with exhibits and proofs therein mentioned, finding Charles S. MacCarty personally liable for the payment of the incumbrances in question, and that the complainant is entitled to a decree of foreclosure.”

Neither is there any abstract of the decree further than this :

“ Decree of foreclosure and sale pursuant to the report of the master, entered upon the same day, for \$2,536.02, as due by the return of the notes and trust deed.”

Neither does said alleged abstract of the record purport to give the substance of the testimony offered on behalf of the appellee, or even refer to the fact that there was any taken. We can not, therefore, determine from the abstract whether the assignment of errors is well founded or not.

It is the well settled rule of the Appellate Court of this district, as well as of the Supreme Court of Illinois, that “an abstract must, as against the appellant, be sufficiently full to represent all the errors upon which he relies.” *Shields v. Brown*, 64 Ill. App. 259, and cases there cited.

The brief and argument for appellee purport to quote in numerous instances from the record. As these quotations are not challenged by appellant, we accept them as reliable. It thus appearing that the decree of the court below is correct, we have no hesitancy in affirming it for want of a sufficient abstract.

The decree of the Superior Court is affirmed.

John D. Casey v. Wm. M. Vandeventer.

1. **TRIAL BY THE COURT—*Questions of Fact.***—Where a cause is submitted to the court without a jury, the presumption is that the judge trying it is in a position to determine accurately whether the finding is right, and acting under the responsibility of his place, has determined correctly.

2. **JUDGMENT—*Who Can Not Object that it is Too Small.***—The fact that a judgment is too small is an error of which the person against whom it is rendered can not complain.

3. **BILL OF PARTICULARS—*Office of.***—The bill of particulars limits the claims for which recovery can be had to those specifically set forth in it, but it does not limit the introduction of evidence tending to prove such claims.

4. **ABSTRACT—*Must Be Sufficiently Full.***—The abstract must be sufficiently full to present all errors upon which appellant relies.

Assumpsit, for legal services. Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

CHARLES B. OBERMEYER, attorney for appellant.

EDWARD MAHER and CHARLES C. GILBERT, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This was a suit to recover on an alleged contract for legal services. Appellee claimed to be entitled, under an agreement, to a specific share in a fee received by appellant. The cause was submitted to the court without a jury. There was a finding and judgment in favor of appellee.

It is sought to reverse the judgment because it is alleged that the finding of the trial court is not justified by the evidence, and, second, because it is said that appellee could only recover by proving the contract precisely as set out in the bill of particulars, with a preponderance of the evidence.

So far as the first ground of objection is concerned, we

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| 80 | 241 |
| 83 | 442 |
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Casey v. Vandeventer.

find in the record evidence tending to sustain the judgment, and although there is conflict in the testimony, still the finding of the trial court, with the parties before it, should conclude us under this record as to questions of fact. The cause having been submitted to the court without a jury, the presumption is, as was said in substance in *Bishop v. Busse*, 69 Ill. 403, 406, that the judge trying the case "is in a position to determine accurately whether the finding is right, and acting under the responsibility of his place, has determined correctly."

The second objection, that the appellee was entitled to recover neither more nor less than the amount claimed to be due him under the contract as set out in the bill of particulars, and that it was error for the court to assess the damages at less than the full amount claimed, in other words, that the judgment is too small, is not well founded. It is not an error of which the appellant can complain, and no complaint is made by the appellee. *Reid v. Houston*, 20 Ill. App. 48-50.

The bill of particulars limits the claims for which recovery can be had to those specifically set forth therein, but does not limit the introduction of evidence tending to prove such claims. *McDonald v. The People*, 25 Ill. App. 350.

Neither does it prevent the recovery of a less amount than is claimed therein. In this case there was evidence tending to show that the appellant had rendered some services to appellee. The court may, for this reason, have credited appellant with the difference, if any there was, between the amount claimed under the contract and the judgment as rendered. The abstract, however, fails to show the amount of the finding and judgment, and hence we are not advised as to what, if any, deduction was made. The abstract must be sufficiently full to present all errors upon which appellant relies. *Shields v. Brown*, 64 Ill. App. 259. See, also, *South Chicago City Ry. Co. v. Przybylinski*, decided by this court at the present term.

The judgment of the Circuit Court is affirmed.

Charles Glanz v. Anna M. Smith.

1. **INSOLVENCY—*Preferences May be Acquired.***—Under the existing statutes of this State, and in the absence of any national bankruptcy law, a creditor may legally acquire a preference in the security or payment of a *bona fide* debt, when there is neither fraud on the part of the creditor nor collusion with the debtor.

2. **VOLUNTARY ASSIGNMENTS—*Preferences Under.***—Section 18 of the Assignment Act which prohibits preferences among creditors, is directed toward insolvent debtors, and is intended to limit and regulate their course of conduct, after they have determined to yield the dominion and control of their property for the benefit of creditors, by making a general assignment. It has no application to the conduct of creditors, except in case of collusion with debtors, by which an authorized preference is sought to be made. The creditor may, notwithstanding the statute, take steps to secure his debt as best he can. The law does not deprive a creditor of the fruits of superior diligence in securing his indebtedness so long as he does no act resulting in an unlawful preference by the debtor.

3. **SAME—*Where Security or Payment is Obtained.***—Where security or payment is obtained in such a manner as to be treated as having been acquired under or as a part of a general assignment by the debtor, it is a fraud and will not be sustained.

4. **ESTOPPEL—*Of a Party by His Pleadings.***—A party litigant will be estopped from denying the allegations of his own pleading.

Insolvency Proceedings.—Intervening petition. Trial in the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Hearing and decree denying the petition. Appeal by petitioner. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

STATEMENT.

September 8, 1896, the appellee received the sum of \$1,000 in payment of a life insurance policy taken out by her son, who had died a few weeks before. That money was loaned to John Karlstrand, her son-in-law.

Mr. J. N. Hennings, Karlstrand's bookkeeper, who had acted as the agent of the appellee in making proof of claim and in collecting the money from the life insurance company, and in whose hands the appellee had placed the \$1,000,

refused to turn the money over to Karlstrand unless he executed a judgment note for that sum in favor of appellee. Karlstrand accordingly executed the note, delivered it to Hennings September 8, 1896, and the money was used in his business, the books of the insolvent showing that the appellant received \$355 from Karlstrand within ten days after the loan was made.

November 20, 1896, Hennings, who had in his possession and care said judgment note, became alarmed at the condition of Karlstrand's business and consulted Karlstrand's attorney, Mr. Strickler. He informed Mr. Strickler that he was appellee's agent, and that he was holding the judgment note for her, and said if there was going to be any trouble for Karlstrand he thought he would have to enter the judgment. Mr. Strickler requested him not to do it, but to let Karlstrand go ahead with the business and see if he could straighten it out, and to this Hennings consented.

Again, a week later, Hennings called on Strickler and told him that he was afraid he would be obliged to enter up judgment. Strickler again asked him to give Karlstrand more time, and Hennings consented to wait. Up to this time Hennings had not informed Karlstrand of his conversations with Strickler, or that he had any intention of entering judgment on the note.

November 28, 1896, Hennings again called on Strickler, and after a short consultation Strickler sent for Karlstrand, the insolvent. Strickler then told Karlstrand that Hennings had been there and talked with him about the note, and told Karlstrand if Hennings should enter up judgment that he would be obliged to make an assignment. Strickler refused to have anything to do with the judgment note because he was Karlstrand's attorney, but said that he would recommend another lawyer to Hennings. Strickler again requested Hennings to let Karlstrand go on with his business. Hennings again consented, but on December 1, 1896, placed the matter in the hands of appellee's attorney, who entered judgment upon the note December 2, 1896, and an execution was levied under this judgment the following day at 9:40

A. M. The same day Karlstrand made a voluntary assignment with Hennings as assignee, but Hennings resigned December 5, 1896, and the Chicago Title and Trust Company was appointed as his successor. December 9, 1896, the Chicago Title and Trust Company presented its petition, representing that the sheriff of Cook county was in possession of the property of Karlstrand by virtue of said execution, and that if the property were sold by the sheriff it would result in loss to the estate, and asking that the assignee be allowed to take the property from the sheriff, preserving the priority of the lien of said execution, and on the same day the court ordered the assignee to take possession of the property, subject in all respects to the lien of the execution and the right of appellee; and that the lien of said execution should attach to the net proceeds of the said property in the hands of the said assignee, and that the said judgment creditor should first be paid out of the proceeds of said property, leaving, however, to be determined in the County Court the question of the priority of such lien upon the application of any creditor.

December 18, 1896, appellant filed his petition in the County Court, setting forth the entry of said judgment; that said execution had been issued and levy thereof made on the property of Karlstrand; that the judgment note given to appellee was without consideration; that the entering of said judgment and the filing of the deed of assignment constituted an illegal preference under the statute, and were the result of fraud and collusion on the part of the insolvent and judgment creditor. The petitioner prayed that appellee answer petition, but did not waive answer under oath.

January 15, 1897, the appellee filed her answer under oath, denying that the note was not for a sufficient and valuable consideration, and that there was fraud in the giving of the note or in the entering of said judgment, and denying that there was any collusion between the appellee and Karlstrand, the insolvent, and denying that there was any fraud or collusion between Karlstrand, Hennings and

Glanz v. Smith.

the appellee in the entering of judgment, levy of execution and filing of the deed of assignment. The answer sets forth under oath the facts concerning the loan of \$1,000 cash September 8, 1896, and the giving of the judgment note, and alleges that the transaction was *bona fide*, without any fraudulent intention whatever. A hearing was had upon the issues raised by said petition and answer in the County Court of Cook County, and final decree was entered June 14, 1897, finding the execution to be a prior lien upon the property of the insolvent levied upon by the sheriff, denying the petition of appellant and declaring the judgment to be a first and prior lien upon the net proceeds of said property then in possession of the assignee, from which decree the appellant prayed an appeal to this court.

JAMES A. PETERSON, attorney for appellant.

JOHN M. CURRAN, attorney for appellee.

MR. JUSTICE HORTON, after making the foregoing statement, delivered the opinion of the court.

There is no reversible error in the proceedings of the County Court. There is no question but that the money loaned by appellee to Karlstrand was her money. She did not receive it from, or by reason of any act of, Karlstrand. A judgment note was given by Karlstrand, payable to the order of appellee, at the time the money was loaned. The testimony shows no collusion between appellee or her agent and Karlstrand. On the contrary Karlstrand's attorney tried to induce appellee's agent not to enter judgment. The judgment was not entered until about three months after the note was given, nor by reason of any agreement made at the time it was given. We see no evidence of fraud or collusion, actual or constructive, by, or on the part of, appellee.

Since the adoption of the assignment act, twenty years since, the courts of this State have been many times called upon to construe its provisions and to apply the same. It

is not deemed necessary to now attempt a review of all such cases. It is the settled rule in this State, under the existing statutes, and in the absence of any national bankruptcy law, that a creditor may legally acquire a preference in the security or payment of a *bona fide* debt, where there is neither fraud on the part of the creditor nor collusion with the debtor. Where security or payment is obtained in such manner as to be treated as having been acquired under or as a part of a general assignment by the debtor, that is a fraud and will not be sustained.

The most recent concise statement of the rule by our Supreme Court is found in *Plume & Atwood Mfg. Co. v. Caldwell*, 136 Ill. 163, 169, where it is stated that "Section 13 of the Assignment Act, which prohibits preference among creditors, is directed toward insolvent debtors, and is intended to limit and regulate their course of conduct after they have determined to yield the dominion and control of their property for the benefit of creditors, by making a general assignment. It has no application to the conduct of creditors, except in case of collusion with debtors, by which an unauthorized preference is sought to be made. The creditor may, notwithstanding the statute, take steps to secure his debt as best he can. The law does not deprive a creditor of the fruits of superior diligence in securing his indebtedness, so long as he does no act resulting in an unlawful preference by the debtor."

The facts in the case at bar do not show that appellee obtained any illegal preference.

A separate and distinct point in appellant's brief is: "There is no evidence upon which to sustain the alleged preference, viz.—no execution and levy thereof appearing in the record."

We are unable to discover any good reason for this statement. This case is before the court upon the issues raised by the allegations of the intervening petition of this appellant. It is true that the abstract of record filed by appellant's attorney does not show it, but the record shows that in said petition by appellant this allegation appears:

West Side Auction House Co. v. Conn. Mut. Life Ins. Co.

“Your petitioner further represents unto your honors that execution was issued by the Circuit Court of Cook County, Illinois, and placed in the hands of the sheriff of Cook county at twenty (20) minutes after nine o'clock in the forenoon on December 3, 1896, and that levy was made thereon twenty (20) minutes thereafter upon the property of said John Karlstrand.”

Counsel must know that where this allegation appears in his own petition, it was not necessary for appellee to prove the facts there stated.

The judgment of the County Court is affirmed.

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West Side Auction House Co. v. The Connecticut Mutual Life Insurance Co.

1. **LEASE—Execution of, by a Corporation.**—Where a lease is signed by the secretary of a corporation as such secretary, and on the margin above his signature appears the impression of a seal containing the name of the corporation and the word “seal,” it is *prima facie* evidence that it was executed by authority of the corporation, and parties objecting take on themselves the burden of proving that it was not so executed.

Assumpsit, for rent. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff, \$200. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

J. B. MUIR and W. A. PHELPS, attorneys for appellant.

E. PARMELEE PRENTICE, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit in assumpsit to recover rent claimed to be due under a written lease. It is contended by appellant, a corporation, that it never executed the lease and that there is a variance between the declaration and the evidence of the lease in this respect.

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The lease in question was signed by the secretary of the appellant corporation as such secretary, and on the margin above his signature appears an impression of a seal, containing the name of appellant and the word "seal." "The execution of a mortgage under the seal of the company, regular on its face, by the properly constituted officers, is *prima facie* evidence it was executed by the authorities of the corporation, and parties objecting take on themselves the burden of proving it was not so executed." *Wood v. Whelen*, 93 Ill. 153-163.

But it is said such execution is only *prima facie* evidence, and that under the plea of *non est factum* the burden is on appellee to prove the execution. The attestation clause states that the "party of the second part hath hereunto set its hand and seal." The lease on its face states that it is made between appellee and the "West Side Auction House Company * * * of the second part;" and it purports to be executed by the secretary of the latter company, who attached the corporate seal, containing the name of the corporation. The lease purports to be the deed of the corporation, not the deed of the secretary, and to have been executed by the corporation. *Haven v. Adams*, 4 Allen, 80.

There is no attempt to deny the authority of the secretary to execute the lease or to use the corporate seal, nor that it was the secretary who signed the lease as such officer. Having been executed under the corporate seal, the presumption is that the secretary, using the seal, had authority to so use it to execute the lease. *Sapp v. Wightman*, 103 Ill. 150.

Moreover, the appellant ratified the lease by taking and retaining possession of the premises. It is claimed by appellant that there was a surrender of the premises, or an eviction. It is sufficient to say that the evidence does not sustain this contention.

The trial court refused to submit certain questions to the jury at the request of appellant's counsel. If answered, the rights of the parties would have been unaffected.

We find no error in giving or refusing instructions, and the judgment of the Superior Court must be affirmed.

Nathaniel P. Richman v. South Omaha National Bank.

1. **INTEREST—*Contracts Made in Other States.***—A legal contract for interest, made in another State, will be enforced in the courts of this State, notwithstanding the rate of interest in such contract exceeds the legal rate allowed by the laws of this State.

2. **PLEADING—*Office and Purpose of the Declaration.***—The whole purpose and office of a declaration is to advise a defendant in due form of law as to the character and amount of the plaintiff's claim.

3. **SAME—*Questions of Partnership and Joint Liability.***—To put in issue the question of a partnership as distinguished from a joint liability the defendant must plead in abatement.

4. **DEPOSITIONS—*Objections After the Cause is Called for Trial.***—Objections which might have been obviated by issuing a new commission and re-examining the witness can not be considered after the case is called for trial.

Assumpsit, for balance due on overdrafts. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Verdict and judgment for plaintiff by direction of the court. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

STATEMENT.

The firm of Palmer, Richman & Co., of which appellant was a member, was organized in 1887 for the purpose of conducting a live stock commission business at South Omaha, Nebraska. The firm consisted of Richman (the appellant), one Clinton R. Palmer, who died April 29, 1888, and one Joseph B. Blanchard, a resident of Omaha.

The firm opened an account with the South Omaha National Bank August 11, 1887, which account continued during the lifetime of the firm and during the period it was being wound up.

In April, 1889, the surviving partners agreed to dissolve the firm, and Blanchard was authorized to settle its affairs.

At the conclusion of these transactions the firm was indebted to the bank on account of overdrafts, in the sum of \$366.74, as of July 5, 1890.

This action was brought for the purpose of recovering

this balance, with interest at the rate of ten per cent per annum. Richman was the only member of the firm served with process and the only one who defended the suit. He pleaded the general issue and a special plea denying that he was jointly liable with Palmer and Blanchard in respect to the causes of action sued on.

The bank is located at South Omaha, Nebraska, and Palmer resided in Chicago. There is no evidence that the bank ever had any notice of the death of Palmer or of any change in the *personnel* of the firm during the period that the account of the firm was kept with the bank.

After the death of said Palmer it was agreed between the appellee and the surviving partners, on behalf of the firm, that the balance due the appellee should draw interest at the rate of ten per cent per annum. That rate of interest is permitted by special contract, under the laws of the State of Nebraska, where the indebtedness was contracted and where it was payable, as averred in the declaration and established by the testimony.

At the close of the evidence the court directed the jury to find a verdict for the amount of plaintiff's claim, including interest at ten per cent.

LOUIS J. PIERSON, attorney for appellant.

DEFREES, BRACE & RITTER, attorneys for appellee.

MR. JUSTICE HORTON, after making the foregoing statement, delivered the opinion of the court.

There is no question but that the overdraft was made as claimed by appellee. It is, however, contended by appellant, that the amended declaration does not state a partnership liability. Appellee thereby "complains of Nathaniel P. Richman and Joseph B. Blanchard, surviving partners of Clinton R. Palmer, lately trading under the firm name of Palmer, Richman & Co., defendants in this suit, summoned, etc., of a plea of trespass on the case on promises." The declaration concludes as follows:

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“ Nevertheless, the said defendants, and the said Clinton R. Palmer, in the lifetime of the said Clinton R. Palmer, and the defendants, since the death of the said Clinton R. Palmer, not regarding the several promises so by them made as aforesaid, but contriving to deceive and defraud the said plaintiff, have not, nor has either of them, as yet, paid the several sums of money, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do, but to pay the same or any part thereof to the said plaintiff, the said defendants and the said Clinton R. Palmer, in the lifetime of the said Clinton R. Palmer, wholly refused, and the said defendants have ever since the death of the said Clinton R. Palmer, hitherto wholly refused and still do refuse so to do.”

Indorsed upon said amended declaration is an affidavit, stating that the demand of appellant is for money due, “an itemized statement of which is hereto attached and made a part hereof.” That statement commences as follows:

“ Palmer, Richman & Co., a co-partnership, composed of Clinton R. Palmer, Nathaniel P. Richman and Joseph B. Blanchard, engaged in the live stock commission business at South Omaha, Nebraska.

In account with The South Omaha National Bank.”

The first item in said statement is “Balance to credit, Palmer, Richman & Co.” In several places in the statement it appears that transactions forming items thereof were for and by that firm.

It is clear that appellant was not misled or taken by surprise. In one of the instructions asked by him, this condition is stated, viz.:

“ If you believe from the evidence that the defendant, Nathaniel P. Richman, was not in partnership with the defendants, Joseph B. Blanchard and Clinton R. Palmer, as the plaintiff’s declaration alleged.”

There is no specific mention of this point either in the motion for a new trial in the court below, or in the assignment of errors in this court.

The whole purpose and office of a declaration is to advise

a defendant in due form of law, as to the character and amount of plaintiff's claim. This was done by this declaration. To have put in issue the question of a partnership, as distinguished from a joint liability, the defendant should have pleaded in abatement.

The evidence is conclusive that appellant is liable for the amount due appellee. The other party or parties, as to whom appellant claims there was no partnership liability, are not before the court denying such liability. Where a defense is purely technical and is not sustained by any equity, the technical defense must be clear and absolute.

The deposition of Harry C. Bostwick, cashier of appellee, was read upon the trial. In this deposition the witness was asked if there was any arrangement between the bank and Palmer, Richman & Co. with respect to overdrafts and the payment of interest thereon, and if so, what it was. He replied: "They were allowed overdrafts occasionally, and it was agreed that they should pay ten per cent interest per annum." No objection thereto was made at the time of taking the deposition. Appellant was not present at the time. This deposition was filed in court, June 13, 1894. The case was not tried until March 23, 1897. No objection was made to said deposition, or any part thereof, nor any motion made to strike out or suppress the same or any part thereof prior to the time of trial. At the trial appellant moved to strike out the answer above quoted as being incompetent, which motion was denied.

There was no error in denying this motion. The deposition had been on file nearly three years. "Objection which might be obviated by issuing a new commission and re-examining the witness can not be heard after the case is called for trial." *Kassing v. Mortimer*, 80 Ill. 603; *B. S. Green Co. v. Smith*, 52 Ill. App. 159; *Town of Sheldon v. Burry*, 39 Ill. App. 157.

If technical rules be strictly applied, perhaps this appeal should be dismissed. The record shows that after verdict "the defendants enter herein their motion for a new trial;" that judgment was entered against "the defendants, Na-

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thaniel P. Richman and Joseph B. Blanchard, as Palmer, Richman & Co.;" and also that "the defendants having entered their exceptions herein prayed an appeal, * * * which is allowed upon said defendants filing herein their appeal bond," etc. The appeal bond is not signed by the defendant Blanchard, nor for him, or in his behalf, and he is not prosecuting this appeal.

At a succeeding term an order was entered by an agreement as to the spelling of the name of appellant, and it may possibly have been intended by that order to make the judgment stand as against appellant only, although that is doubtful. But there is no change in the order as to the appeal or the appeal bond. There is no motion to dismiss the appeal and we therefore prefer to affirm the judgment.

The judgment of the Superior Court is affirmed.

Joseph Fahndrich, Charles J. Fahndrich and Fred P. Fahndrich, copartners, trading as Fahndrich & Sons, v. Edward Hudson.

1. CHATTEL MORTGAGES—*Must be Acknowledged*.—To be valid as against the rights and interests of third persons a chattel mortgage must be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, and recorded in the county; or, in case he is a non-resident of this State, then in the county where the property is situated and kept.

2. SAME—*Certificate of Acknowledgment False—Mortgage Void*.—Where the certificate of acknowledgment of a chattel mortgage, regular in form, is shown to be false, the mortgage is void.

Replevin.—Count in trover. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff, \$600. Appeal by defendants. Heard in this court at the March term, 1898. Reversed. Opinion filed May 26, 1898. Rehearing denied June 9, 1898.

STATEMENT OF FACTS.

In the year 1894 the firm of Jameson & Escanbrock were engaged in business as butter merchants in Chicago, and

on May 12th in that year, being indebted for a loan to the firm by appellee of \$700, Malcom Jameson, one of the partners, in his own name and that of the other partner, P. J. Escanbrock, and also in the firm name by himself, executed a note for the amount of the loan, payable on or before one year from date to appellee, bearing interest at seven per cent. To secure this note he also, in the same manner, executed a chattel mortgage in the usual form of chattel mortgages, by which certain personal property of the firm, consisting of horses and wagons, was sold and conveyed to appellee, the mortgage to be void if the note and interest thereon should be paid.

The mortgage purports to have been acknowledged May 12, 1894, before George L. Ford, a justice of the peace, by "Malcom Jameson and P. J. Escanbrock, firm of Jameson & Escanbrock," and was entered on the justice's mortgage record the same day, and was recorded in the recorder's office of Cook county, Illinois, August 24, 1894. May 14, 1894, the note and mortgage were delivered to appellee. Early in September, 1894, appellant commenced a suit by attachment before a justice of the peace against Jameson & Escanbrock and D. J. Jameson, and caused the writ to be levied by a constable on part of the horses and wagons described in the mortgage September 20, 1894. No service was had on Escanbrock, and judgment was rendered against the other two defendants, the Jamesons, October 10, 1894, for \$86.24 and costs.

October 10, 1894, appellee brought replevin against appellants in the Circuit Court of Cook County for the horses and wagons attached at the suit of appellants, the writ being returned not executed as to the property. The declaration had the usual counts in replevin and a count in trover. The pleas were *non cepit*, *non detinet*, property in the Jamesons and Escanbrock, property in appellants, and not guilty as to the trover count. Issues were joined and a trial before the court and a jury resulted in verdict of guilty, right to possession in plaintiff, and assessing damages at \$600. Defendants' motion for new trial was over-

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ruled, and judgment entered against defendants for \$600 damages, from which they appealed.

W. J. LAVERY, attorney for appellants.

GEORGE P. MERRICK, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

The only question which we deem necessary to consider is the validity of the chattel mortgage under which appellee claims the right to recover.

There is no dispute but that Escanbrock, one of the partners in the firm of Jameson & Escanbrock, failed to sign or acknowledge the mortgage. It was signed in the name of Escanbrock, and also in the name of Jameson & Escanbrock by Malcom Jameson. Escanbrock did not appear before the justice to acknowledge the mortgage, and did not acknowledge it. The acknowledgment was by Jameson alone, although the justice of the peace certified that Escanbrock acknowledged the mortgage. He testified that he told Jameson to sign his (Escanbrock's) name to the paper, but says nothing as to directing Jameson to acknowledge the mortgage in his behalf. The certificate of acknowledgment was therefore false in stating that Escanbrock acknowledged the mortgage, and was invalid as to the appellants who were creditors of Jameson & Escanbrock. The statute (2 Starr & Curtis, Ch. 95, Sec. 2) provides, among other things, that the mortgage, before it shall be valid as against the rights and interests of any third person, shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, and recorded in the county where the mortgagor resides, or, in case he is a non-resident of this State, then in the county where the property is situated and kept.

In Frank v. Miner, 50 Ill. 444-7, it was held that if either of the requirements of the statute is wanting, while the mortgage is binding between the parties, it is void as to creditors and purchasers. The mortgage was held void

because it was not acknowledged before a justice of the precinct where the mortgagor resided.

To the same effect is *Rehkopf v. Miller*, 59 Ill. App. 662.

In *Long v. Cockern*, 128 Ill. 29–36, it was held that as to creditors with actual notice, a chattel mortgage, acknowledged before a notary public, was void.

In *Burchard v. Kohn*, 157 Ill. 583, it was held that a chattel mortgage which was not recorded was void as to creditors, though good as between the parties.

In *First Nat. Bank v. Baker*, 62 Ill. App. 158, a chattel mortgage purporting to be made by the Corey Car & Manfg. Co., and acknowledged by “James B. Rielly, Secy., and Francis W. Corey, Prest., the mortgagors therein named,” was held to be void as against a creditor because the acknowledgment did not purport to be that of the mortgagor. The court said, “We are not to consider what one who reads this certificate might conclude, but what is certified.”

In *Walton v. Gernand*, 65 Ill. App. 19, a chattel mortgage of household furniture, although signed by a husband and wife, and purporting to be acknowledged by both, was held to be void, it being shown that the wife did not in fact acknowledge the mortgage—that the officer’s certificate was false.

In *McDonald v. Stewart*, 83 Ill. 538, where the certificate of acknowledgment to a chattel mortgage regular in form was shown to be false, the mortgage was held to be void, and in deciding the case the court said: “Whether notice was conveyed to parties as well by the instrument, as thus executed, as it would have been had the law been faithfully observed, is not for us to inquire. As between the parties, it was valid without any acknowledgment; but without the acknowledgment it has no effect upon the rights of third parties acting in good faith. In such case actual notice of the mortgage does not prevent the creditor from asserting his right to subject the property to the payment of his debt. (Citing cases.) There is no want of good faith on the part of a creditor in levying upon his debtor’s property included

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in a chattel mortgage which the law declares void as to him." See also Aultman v. Guy, 41 Ohio St. 598, and cases cited; and Westlake v. Westlake, 47 Ohio St. 315, in which it was held that the word "mortgagor," in a statute similar to the Illinois statute, means each mortgagor.

We are therefore of the opinion that the chattel mortgage which is the basis of appellee's claim, not having in fact been acknowledged by Escanbrock, one of the mortgagors, was void as to appellants because of the falsity of the certificate of the acknowledgment, and the judgment is reversed.

Knickerbocker Ice Co. and W. S. Mann v. William Scott.

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1. MALICIOUS PROSECUTION—*What is Necessary to Maintain the Action.*—To maintain an action for malicious prosecution it must appear that there was not probable cause for the prosecution, and also that the defendant was actuated by malice in instituting the prosecution. There must be both want of probable cause and malice.

Trespass on the Case, for malicious prosecution. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict for plaintiff, \$2,500. Remittitur by suggestion of the court, \$2,100. Judgment for \$400. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Reversed. Opinion filed June 21, 1898.

STATEMENT.

This was an action for malicious prosecution. Appellee, in June, 1894, was an employe of the Metropolitan Ice Company. June 29, 1894, he backed a wagon which he was in charge of up to a car loaded with ice for the Knickerbocker Ice Company and took away a ton or more of ice belonging to the latter company. Information of the taking came to the appellant Mann, the superintendent for the Knickerbocker Ice Company; he communicated with the main office, and was directed to swear out a warrant for the arrest of appellee on a charge of larceny, which was done. Appellee

was arrested and taken to the station, and was bailed out about midnight. The case was three times continued, and was finally dismissed for want of prosecution nearly a month after the arrest. It is said that the Metropolitan Ice Company adjusted the matter with the Knickerbocker Ice Company, and hence the prosecution was abandoned and appellee discharged. He then brought this suit. A verdict for \$2,500 was returned by the jury, but \$2,100 was remitted at the suggestion of the trial court. Judgment was entered for \$400, and appeal taken.

WILFRED H. CARD and MATZ, FISHER & BOYDEN, attorneys for appellants.

To the maintaining of an action for malicious prosecution two things must concur:

1. That there was want of probable cause for the prosecution.

2. That the prosecution was malicious. *Smith v. Michigan Buggy Co.*, 66 Ill. App. 520.

The burden of proof is on the plaintiff in a suit for malicious prosecution to show by a clear preponderance of the evidence that the defendant did not have probable cause to institute the prosecution. *Palmer v. Richardson*, 70 Ill. 544; *Skala v. Rus*, 60 Ill. App. 479.

To justify an arrest, it is sufficient to show that a crime had been committed by some one, and the facts had come to the knowledge of the person causing the arrest which furnished probable cause or reason to suspect that the person arrested was the guilty party. *Mex. Cen. R. R. v. Gehr*, 66 Ill. App. 192.

All that is required to constitute probable cause is an honest belief or strong ground of suspicion of the guilt of the person arrested and a reasonable ground for the belief or suspicion; and that may be upon information from others as well as personal knowledge. *Harpham v. Whitney*, 77 Ill. 32.

CUNNINGHAM, VOGEL & CUNNINGHAM, and H. H. FERRELL, attorneys for appellee.

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In order to establish probable cause, it is laid down that there must exist an honest belief on the part of the prosecutor, such as a reasonably cautious man would have, of the guilt of the accused, founded on circumstances tending to show that he had committed a criminal offense; how can it be claimed on the evidence in this case, with all the knowledge that the prosecutor had of the disposition of the ice, and the utter absence of any conversion, that there was an honest belief of Scott's guilt?

Our Supreme Court has held in numerous cases, and in conformity with all the common law authorities, that "where it is proved that the prosecution is without reasonable or probable cause, a jury may infer malice." *Krug v. Ward*, 77 Ill. 608; *Chapman v. Cory*, 50 Ill. 512; *Israel v. Brooks*, 23 Ill. 575; *Ross v. Innis*, 35 Ill. 487.

"That evil quality of the heart which prompts a man to make a false charge against another for the purpose of private gain or advantage, is legal malice." *Neufeld v. Rodimsky*, 144 Ill. 83; *Kimball v. Bates*, 50 Me. 308; *Brooks v. Warwick*, 2 Starkey, 393; *Ross v. Langworthy*, 13 Neb. 492.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

"To maintain an action for malicious prosecution, it must appear that there was not probable cause for the prosecution, and also that the defendants were actuated by malice in instituting the prosecution. There must be both want of probable cause and malice." *Harpham v. Whitney*, 77 Ill. 32-38.

The absence of probable cause must be clearly shown by a preponderance of the evidence, and the burden is upon the plaintiff to show that there was no such cause. If there was reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense charged, then probable cause exists. *Palmer v. Richardson*, 70 Ill. 544-546, and cases there cited.

In this case it is conceded that the appellee did take a

ton or more of ice belonging to the appellant company. The car was marked with a large card, "Ice for the Knickerbocker Ice Company," and if he did not see it, the evidence tends to show that he might, and ought to have done so, before he loaded up his wagon. If he had sold this ice to his own customers, for his own private benefit, no question would arise as to there being probable cause for his arrest and prosecution, if these were all the facts known to his accusers.

But it is said that he was acting for his employer, the Metropolitan Ice Co.; that he took the ice under direction of its superintendent; that he delivered the ice to the customers of that company and received no personal benefit from the taking; and that this was known to appellants when the warrant was sworn out. Appellee's counsel therefore urges that the arrest was without probable cause and was for the purpose of forcing a settlement with the Metropolitan Ice Co.; that appellants knew that appellee had no guilty intent to convert the ice to his own use, but "simply took it for the company he represented, and by mistake."

There is no evidence that the appellants knew or had reason to know that their ice had been taken by mistake. Nor is it a necessary inference that because the ice was taken for the use of a corporation by which appellee was employed, there was no guilty intent in the taking. If a corporation commits a theft, it acts by its agent. The corporation can not be arrested. The agent can be. If a man commits a theft for the benefit of his employer, he can not escape punishment on that account alone. He may steal and give the booty to another, but his theft is no less a crime. In this case appellee may have had no guilty intent, but its absence was not proven solely by the fact that the ice was delivered to the customers of his employer. If appellee took the ice, knowing it to be the property of the Knickerbocker Ice Co., or if appellants had reasonable grounds for suspicion, supported by circumstances sufficiently strong to warrant such a belief in a cautious man, then there was probable cause.

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Appellee has failed to show that there was not probable cause for the prosecution. On the contrary, the evidence tends to show affirmatively the existence of such cause.

The fact that the jury returned a verdict of \$2,500, which in the opinion of the trial court was so excessive as to require that all but \$400 of it should be remitted, indicates the influence of a prejudice which taints the verdict as a whole. In *Palmer v. Richardson*, above referred to, Mr. Justice Craig says: "It seems to be difficult for a jury to comprehend that an innocent person may be arrested for a criminal offense, and at the same time the law affords no redress against the person who caused the arrest and prosecution."

It is clear that appellee can not recover under the facts as shown by the evidence, and the judgment of the Circuit Court is therefore reversed without remanding.

George Turner v. City of Chicago.

1. CITY COUNCIL—*Power to Fix the Term of Officers Appointed by it.*—The city council of the city of Chicago may, by ordinance, fix the term of office of an officer, not exceeding two years, for the appointment of whom it has power, but there can be no increase or diminution of his salary where none has been provided for such officers.

2. SAME—*Power to Fix Salaries.*—The city council may fix the salaries of such city officials in the *annual* appropriation bill for one year, and may do so in the annual appropriation bill for the next and each successive year, but having once been so fixed for that particular year, it is forbidden to increase or diminish any such salary during the year for which the appropriation has been made, implying that any such increase or diminution must and can be made in and by the next annual appropriation bill, or by some ordinance prior to its passage.

8. OFFICERS—*Sufficient Notice of Removal.*—The city council of the city of Chicago failed to make an appropriation for the payment of the salary of a police court bailiff, and the city comptroller, acting under the direction of the mayor, served a notice upon him as follows: "The council having refused to appropriate for the payment of salaries to police court bailiffs for the year 1896, you are hereby officially notified that after this date your services are no longer required by the city of Chicago. You will therefore make your report to this office and imme-

diately turn over all moneys, executions and other property belonging to the city now in your hands." This was held to be in effect a removal of the plaintiff from office, notwithstanding there was no formal charge.

Assumpsit, for an officer's salary. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Judgment for defendant on demurrer to plaintiff's replication to defendant's special plea. Error by defendant. Heard in the Branch Appellate Court, First District, March term, 1898. Affirmed. Opinion filed June 21, 1898.

STATEMENT.

Plaintiff in error sued the city of Chicago in assumpsit for salary as police court bailiff, from March 1, 1896, to February 5, 1897, at the rate of \$1,000 per annum. Defendant pleaded specially, to which plaintiff replied, and a general demurrer was filed to plaintiff's replication, which was sustained, and plaintiff electing to stand by his replication, judgment was rendered against him for costs.

The office of police court bailiff was created by a city ordinance, enacted November 8, 1886, providing that such officer may be appointed by the mayor, by and with the consent of the council, biennially.

May 20, 1895, plaintiff was appointed, the council having, March 8, 1895, passed the annual appropriation ordinance, in which it appropriated for salaries of police court bailiffs, \$1,000 each. The salary was not fixed by any general ordinance, or in any other way than by the appropriation bill.

Plaintiff acted as bailiff until March 3, 1896, when he received a communication from the comptroller, acting under the direction of the mayor, which was as follows:

"The council having refused to appropriate for the payment of salaries to the police court bailiffs for the year 1896, you are hereby officially notified that after this date your services are no longer required by the city of Chicago. You will therefore make your report to this office and immediately turn over all moneys, executions and other property belonging to the city, now in your hands."

Plaintiff received the salary for the year as provided in the appropriation.

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The annual appropriation ordinance of March 2, 1896, made no provision for bailiffs, the chief of police having advised that regular patrolmen could perform the duties of the office.

The mayor did not report to the city council nor file with the city clerk a statement of reasons for the removal, nor did plaintiff give new bonds or take a new oath of office in accordance with the provisions of Section 7, Art. 2, Chap. 24, R. S.

JESSE B. BARTON, attorney for plaintiff in error.

CHARLES S. THORNTON, corporation counsel, WILLIAM H. SEXTON, assistant corporation counsel, attorneys for defendant in error.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

The statute provides (Section 271, Chap. 24, R. S.) that the council or legislative authority of the city may establish and fix the amount of salary to be paid any and all city officers, except members of such legislative body, in the annual appropriation bill or ordinance, made for the purpose of providing for the annual expenses of any such city, or by some ordinance prior thereto; and the salaries thus fixed shall neither be increased nor diminished by the council after the passage of such annual appropriation bill, "during the year" for which such appropriation is made, and no extra compensation shall ever be allowed to any such officer.

It is contended that as the plaintiff was appointed to an office, the term of which was two years, and the salary of which was fixed at one thousand dollars for the fiscal year of 1895, by the appropriation ordinance of that year, the salary became and was thereby fixed at that sum for the entire term.

If the city council may fix the salaries of such city officials in the annual appropriation bill for one year, it is

difficult to perceive why it may not do so in the annual appropriation bill for the next and each successive year. Having once been thus fixed for that particular year, the council is forbidden to increase or diminish any such salary during the year for which the appropriation has been made, thus implying that any such increase or diminution must be and can be made in and by the next annual appropriation bill or by some ordinance prior to its passage.

It is not claimed in this case that the appropriation bill of 1895 fixed the salary for two years in specific terms, nor is it claimed that this had been done by the ordinance of November 8, 1896, creating the office of police court bailiff, or by any other ordinance; but it is said that the passage of the appropriation bill was equivalent to providing that the salary fixed for the year 1895 should be the salary for the remainder of the term, and that to hold otherwise would either annul the power of the city council to fix a term of office longer than one year, or would empower it to nullify the constitutional provision forbidding the salary of a municipal officer to be increased or diminished during his term.

The city council may by ordinance fix the term of office, not to exceed two years, of officers for the appointment of whom it has power to provide. (Sec. 23, Art. VI, Chap. 24, R. S.) But conceding that the constitutional provision is applicable to an office so created by the city council, there can be no increase or diminution of a salary where none has been provided. In this case the city council, according to the pleadings, appropriated a specific sum for payment of a salary to plaintiff for one year, and this was paid. No salary was established and no provision made for any other or longer term.

The act which thus empowers the city council to provide for the appointment of such officers as it may deem expedient and to prescribe the term of such office, provided it shall not exceed two years, is not inconsistent with the provisions of the act enabling the city council also to establish and fix the salaries of such officers each year in the annual appro-

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priation bill. When the term of an office so created by an ordinance of the city council is fixed at two years, it is so fixed subject to the power of the council to establish a salary for each year of the term in the appropriation bill for that year, unless otherwise expressly provided. No salary in this case was ever attached to the office. A definite sum was appropriated in the appropriation bill of 1895, and in the absence of any other or different provision this was the entire salary which the plaintiff ever became entitled to, without reference to the term for which he was appointed.

Plaintiff accepted the office and undertook its duties with full knowledge that no other or further provision for salary had been made. The mere creation of an office with a fixed term does not necessarily imply nor include any fixed salary; and if with no salary specified the council sees fit to provide a certain compensation for one month or one year, we know of no rule of construction which would permit us to hold that the city thereby became liable at the same rate for the whole term.

This is not a case where services have been rendered without compensation therefor, in and for a part of a new fiscal year, under an implied agreement and understanding that the city council would, in the appropriation ordinance of that year, provide for the accustomed salary. No claim is made that plaintiff has not been paid in full for all the time during which he performed the duties of the office.

Plaintiff contends that the official notice which he received from the comptroller, by direction of the mayor, was not a removal. We regard the notice as sufficient. It was in effect a removal of plaintiff from office, notwithstanding there was no formal charge. *Hutchins v. Heffron*, 56 Ill. App. 581; also, 160 Ill. 550.

We are of opinion that the demurrer was properly sustained, and the judgment of the Circuit Court will therefore be affirmed.

North Chicago Street R. R. Co. v. Sarah B. Brown.

1. **QUESTIONS OF FACT**—*Where Witnesses Differ.*—Where witnesses are called upon to give the details of an accident, and differ, such difference must be great to justify this court in interfering with the verdict.

2. **DAMAGES**—\$5,000 *Not Excessive.*—Before the injury plaintiff was a strong, healthy woman; for four weeks afterward she lay at the residence of a friend, and for over five months thereafter at the County Hospital. She suffered much pain and for eight months after leaving the hospital was compelled to use crutches, and over six years after was still using a cane. There was testimony tending to show that the injury was to the hip joint and might be permanent. *Held*, that the verdict for \$5,000 was not excessive.

3. **INSTRUCTIONS**—*In Personal Injury Cases.*—The court passes upon and holds proper several instructions given for the plaintiff.

4. **NEGLIGENCE**—*And Want of Proper Care.*—“Want of proper care” and “negligence” are substantially synonymous terms; whichever term is used the fact is one to be determined by the jury from all the circumstances developed by the testimony.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Verdict and judgment for plaintiff, \$5,000. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

Even where the evidence is conflicting, if it preponderates strongly in favor of defendant, a verdict against him should be set aside and a new trial granted, and if refused the judgment will be reversed for that error. *Chicago, R. I. & P. R. R. Co. v. Herring*, 57 Ill. 59; *Columbus, C. & I. C. Ry. Co. v. Troesch*, 57 Ill. 155; *Wade v. Atkins*, 58 Ill. 64; *Janney v. Birch, Adm'r*, 58 Ill. 87; *Peaslee v. Glass*, 61 Ill. 94; *Lincoln v. Stowell*, 62 Ill. 84; *Davenport v. Springer*, 63 Ill. 276; *Schwartz v. Lammers*, 63 Ill. 500.

ARND & ARND and LYNDEN EVANS, attorneys for appellee.

Where the evidence is conflicting and irreconcilable, the verdict will not be set aside on appeal or error, as against

the weight of the evidence, unless it is so contrary to the evidence as to warrant the inference that it is the result of passion or prejudice or misunderstanding. *Kincade v. Turner*, 2 Gilm. (Ill.) 613; *Chapman v. Burt*, 77 Ill. 337; *Miller v. Balthasser*, 78 Ill. 302; *Stickle v. Otto*, 86 Ill. 161.

The verdict can not be set aside as against the weight of evidence, where the evidence is conflicting, inconclusive and irreconcilable, there being nothing to show improper motives; the weight of evidence is for the jury. *Pulliam v. Ogle*, 27 Ill. 189; *Dunning v. Fitch*, 66 Ill. 51; *Kightlinger v. Egan*, 75 Ill. 141.

The verdict can not be set aside as against the weight of evidence, where the evidence is conflicting and by a fair and reasonable intendment warrants the finding, although the preponderance appears to be the other way. *Lowry v. Orr*, 1 Gilm. 70; *Chicago & A. R. R. Co. v. Shannon*, 43 Ill. 338; *Shevalier v. Seager*, 121 Ill. 564.

Where the evidence is conflicting and irreconcilable, it is for the jury to weigh it and reject such as it thinks unworthy of belief. *Brown v. Berry*, 47 Ill. 175.

Where there is much conflicting evidence, the verdict will not be set aside merely because it is against the weight of evidence. *Morgan v. Ryerson*, 20 Ill. 344.

A new trial will not be granted on the ground that the verdict is against the weight of evidence, unless the verdict is manifestly wrong. Where the evidence is in conflict, it is for the jury to weigh it and decide according to the balance. *Johnson v. Moulton*, 1 Scam. (Ill.) 532; *Clark v. Pageter*, 45 Ill. 185; *Jacquin v. Davidson*, 49 Ill. 82; *Lawrence v. Hageman*, 56 Ill. 68; *Somers v. Stark*, 76 Ill. 208.

The verdict and the judgment are not excessive. *Illinois C. R. R. Co. v. Wheeler*, 50 Ill. App. 205; *City of Lanark v. Dougherty*, 45 Ill. App. 266; *Chicago A. P. B. Co. v. Rembarz*, 51 Ill. App. 543; *West Chicago Street R. R. Co. v. Bode*, 51 Ill. App. 440; *T. W. W. R. Co. v. Fredericks*, 71 Ill. 294; *C. & A. R. R. Co. v. Wilson*, 63 Ill. 167; *Illinois C. R. R. Co. v. Parks*, 88 Ill. 373; *C. & E. I. R. R. Co. v. Holland*, 18 Ill. App. 418.

The court did not err in instructing the jury. Chicago B. & Q. R. R. Co. v. Yorty, 158 Ill. 321; Illinois Central R. R. Co. v. Gilbert, 157 Ill. 354, p. 366.

MR. JUSTICE HORTON delivered the opinion of the court.

This is an action by Sarah B. Brown to recover damages for personal injuries, alleged to have been sustained through the negligence of the North Chicago Street Railroad Company. The declaration consists of one count, and alleges that on the evening of February 15, 1891, the appellee was a passenger on one of the appellant's Lincoln avenue cable cars; and that upon its arrival at Larrabee street, in the city of Chicago, and while the appellee was about to alight with due care, the appellant negligently caused the car to be suddenly started, thereby throwing her to the ground, causing the injuries complained of.

As appears from the evidence, the appellee, while attempting to alight from a car of the appellant at the time and place stated, fell and received certain injuries. Whether this was caused by the negligence of the appellant, while the appellee was in the exercise of ordinary care, is the issue.

At the trial the jury found the issues for the appellee and assessed her damages at \$5,000, and judgment having been entered on the verdict, the defendant below brings the record to this court for review.

The jury upon a former trial returned a verdict for the sum of \$10,800 damages.

First. The first point urged by appellant is that the verdict and judgment are contrary to the evidence, or, as counsel say in concluding their argument upon this point, "contrary to the preponderance of the evidence." As stated above, this is the second verdict in this case, and is for less than one-half the amount of the first.

It is not necessary to review at length the testimony. As is usual where several witnesses are called to give the details of an accident, they differ. But here the differences are not so great as to justify this court in interfering with the verdict of the jury.

Second. The next point urged by appellant is that the verdict and judgment are excessive. The injury to appellee was serious. Before the injury she was a strong, healthy woman. For four weeks after the injury she lay at the residence of a Mr. Thomas, and for over five months thereafter she was at the County Hospital. During these six months she suffered much pain. For some eight months after leaving the hospital she was compelled to use crutches, and up to the time of the second trial, over six years after the accident, she was still using a cane. There is testimony tending to show injury to the hip joint. At the time of the injury she was thirty-five years of age. There is also testimony tending to show that the injury may be permanent. The testimony is such that there is no warrant for an inference that the jury was influenced by passion or prejudice. We can not interfere with this verdict upon the theory that it is excessive.

Third. The only other point urged by appellant is that the trial court erred in instructing the jury. Complaint is made as to the giving of two of appellee's instructions, the first of which is as follows, viz:

"If the jury believe from the evidence in this case, that the defendant controlled and operated, for the purpose of carrying passengers for hire, certain street cars upon Lincoln avenue, in the city of Chicago, Cook county, Illinois, and that the plaintiff on or about the 15th day of February, 1891, was a passenger for hire on one of the said cars of the defendant, and that the defendant, by its servant, caused the said car to be stopped for the purpose of allowing passengers to alight therefrom, and the plaintiff was in the act of alighting from said car while said car was so stopped, and while in the act of alighting from said car was using all reasonable care and caution to avoid the injury complained of in the declaration, and that the defendant, through its servant, negligently and carelessly caused said car to be set in motion while the plaintiff was so alighting from said car, and that thereby the plaintiff was injured, then the jury should find the defendant guilty."

The reasons urged against the correctness of this instruction are: (1) That there is no testimony tending to show care on the part of the appellee upon which to base the instruction; (2) that it entirely omits the question as to whether negligence of appellee was the proximate cause of the injury; and (3), that it requires of appellee reasonable care, but does not instruct the jury as to what is reasonable care.

These objections to this instruction can not be sustained. We do not agree with the counsel that there is no testimony tending to show care on the part of the appellee. All her actions at the time of the injury were fully stated by witnesses. Of course no witness was asked if appellee was exercising proper care; or whether there was negligence on her part. "Want of proper care" and "negligence" are substantially synonymous terms. Whichever term is used, the fact is one to be determined by the jury from all the circumstances developed by the testimony. When this instruction is considered with all the other instructions in the case, it will be seen that the jury could not have been misled or left in ignorance as to what constitutes "reasonable care."

The other instruction complained of is this, viz.:

"The court instructs the jury that if, under the evidence and instructions of the court, the jury find the defendant guilty, then in assessing the plaintiff's damages, the jury may take into consideration not only the loss and immediate damage arising from the injury received at the time of the accident, but also the permanent loss and damage, if any is proved by the evidence, arising from any disability resulting to the plaintiff from the injury in question, which renders her less capable of attending to her business than she would have been if the injury had not been received."

We give appellant's criticism of this instruction in the language of its counsel in their argument, viz.:

"This instruction, as will be seen, also leaves entirely out of view the question whether the injury for which the jury might assess damages was the natural and proximate result of the negligence of the defendant, and it practically

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tells the jury that they may assess any damage, whether it be the proximate and natural result of the negligence or that which is more remote."

It should be stated that there is no evidence tending to show any other reason or cause than that of the injury complained of for appellee's illness, pain and suffering or lameness. It is no doubt the law that appellee can not recover in this case for any damages which are not the natural and proximate result of the injury complained of. There is nothing in this instruction which infracts that rule. Indeed, this instruction definitely limits the recovery to damages directly resulting from the injury in question. The language is as to damages, if any, "arising from any disability resulting to the plaintiff from the injury in question." If the disability resulted in whole or in part from any cause other than the injury to appellee produced by her fall when alighting from appellant's car, the jury could not, under this instruction, assess damages therefor.

The judgment of the Circuit Court is affirmed.

James Gaynor v. L. H. Harding.

1. TRIALS BY THE COURT—*Presumptions*.—Where the trial is without a jury the presumption is that the judge, hearing all the evidence, with the parties before him, is in a position to determine accurately whether the finding is right, and, acting under the responsibility of his place, has determined correctly.

Assumpsit, for merchandise sold and delivered. Trial in the Superior Court of Cook County, on appeal from a justice of the peace; the Hon. THEODORE BRENTANO, Judge, presiding. Hearing by the court without a jury. Finding and judgment for plaintiff, \$126.86. Appeal by defendant. Heard in the Branch Appellate Court of the First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

STUBBLEFIELD & QUINLAN, attorneys for appellant.

ELMER BISHOP, attorney for appellee.

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MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellee obtained a judgment before a justice of the peace against appellant, from which an appeal was taken to the Superior Court of Cook County, where, the jury having been waived, the case was tried by the court and a judgment was entered for \$126.36 for the plaintiff.

The controversy in this case is purely one of fact. There is no denial that the hardware furnished by appellee was actually used in the buildings owned by appellant, and for his benefit, and that the prices charged therefor were reasonable and proper. The only contention is whether the hardware was ordered by and sold directly or indirectly to appellant, or whether the sale was to the contractor personally. Upon that question the evidence is conflicting. Appellee's version of the arrangement is corroborated by the contractor; and that he understood he was selling the goods to appellant is to some extent confirmed by the fact that he charged directly against appellant all the hardware delivered at and after the date when the conversation occurred at which it is claimed the order was given.

It is said the value of appellee's testimony is destroyed by the formal notice of lien, which states in the statutory form that he had "been employed by" the contractor, thus contradicting, it is claimed, his oral statement. This does not necessarily follow, and the trial court was by no means bound to so conclude. There is evidence tending to sustain the judgment, and the presumption is that the judge, hearing all the evidence, with the parties before him, "in a position to determine accurately whether the finding is right, and acting under the responsibility of his place, has determined correctly." *Bishop v. Busse*, 69 Ill. 403-406.

The judgment of the Superior Court is affirmed.

Barrett v. Boddie.

**William H. Barrett and Charles R. Barrett, Partners as
Barrett & Barrett, and John Z. Vogelsang v.
John T. Boddie.**

1. INSTRUCTIONS—*Canceling Leases*.—It is error to instruct a jury that the parties to a lease can not rescind or cancel it without the consent of the principal parties who are only guarantors upon it for the payment of the rent.

2. SAME—*Should Not Limit the Finding, etc.*—An instruction should not limit the finding to a part of the facts bearing on the point presented.

3. PRINCIPAL AND GUARANTOR—*Liability*.—When the principal is not liable the guarantor will not be.

Action for Rent.—Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendants. Heard in the Branch Appellate Court of the First District at the March term, 1898. Reversed and remanded. Opinion filed June 21, 1898.

STATEMENT.

This suit was brought by appellee to recover from appellants an amount claimed to be due him as rent of the store, No. 128 South Clark street, Chicago, according to the terms of a written lease. The lease is dated January 8, 1892, and is for a term of five years, from May 1, 1892. The rent is made payable in monthly installments of \$500 each in advance. This lease purports on its face to be between appellee as lessor and "John Z. Vogelsang and William H. and Charles R. Barrett—firm of Barrett & Barrett"—all of Chicago, as lessees. The signature of the lessees is "Barrett & Barrett, by C. R. B. John Z. Vogelsang."

At the trial it was conceded by appellee and sworn to by him that Barrett & Barrett were guarantors or sureties on the lease; that appellant Vogelsang wanted the place; that appellee required of him security; that he proposed Barrett & Barrett, who were accepted by appellee; and that appellee requested that they execute the lease jointly with Vogelsang, although it was signed by them as security.

By a lease dated March 28, 1892, appellee leased to said

Vogelsang the basement under said store for the same term, the rent payable in the same manner, at the same time, and at the same place as is provided in the lease of said store, the rent being \$100 per month.

Appellant Vogelsang entered into possession under both leases at the same time, *i. e.*, May 1, 1892. He continued in such possession until in October, 1892, when he assigned both of said leases to H. H. McCuen, who then entered into possession thereunder, and continued in such possession until January 23, 1893. Said McCuen sold out to John Mahler and assigned both of said leases to him January 23d. Said Mahler at that time went into possession of all of said premises, which continued up to the time of the trial.

During the time appellant Vogelsang and said McCuen remained in possession of said premises, they respectively paid the full amount of rent due under both of said leases, *i. e.*, they paid to appellee \$600 per month. Mahler paid to the appellee the rent in full at the rate of \$600 per month for one year or more, as though there was but one lease, that is, until February 1, 1894. After that he continued to pay rent, but had not paid it in full.

Appellants Barrett & Barrett never made or participated in the making of any assignment of the lease of the store, and did not know of Vogelsang's sale and assignment of his leases until it was fully consummated. Neither Barrett & Barrett nor Vogelsang consented to the sale and assignment of leases by McCuen to Mahler. Barrett & Barrett refused to consent to either of said assignments. Appellee never formally consented to the making of said assignments or either of them, but refused so to do.

CHARLES H. JACKSON, attorney for appellants.

WOOLFOLK & BROWNING, attorneys for appellee; R. S. THOMPSON, of counsel.

MR. JUSTICE HORTON, after making the foregoing statement, delivered the opinion of the court.

As this case must be remanded for another trial, we do

Barrett v. Boddie.

not review the facts further than may seem desirable in considering the instructions.

The first instruction given to the jury at the request of appellee is as follows:

“To release a tenant from his lease requires the mutual consent of the landlord and the tenant, and unless the jury believe from the evidence that Boddie, the plaintiff, as well as Barrett & Barrett and John Z. Vogelsang, mutually consented to rescind and cancel the former lease, entered into between them, and that Boddie entered into a new and different lease with John Mahler, then the jury will find for the plaintiff.”

As between the parties to this suit, Barrett & Barrett stood in the relation of guarantors, and were liable only as such. It follows that if appellee and appellant Vogelsang “mutually consented to rescind and cancel the former lease,” they could do so without regard to Barrett & Barrett. Or if appellee released appellant Vogelsang from the payment of rent under the lease and from liability therefor, that would release Barrett & Barrett from all liability upon that lease, and would in law be a rescission and cancellation thereof. There is evidence tending to show that appellee did so release Vogelsang. It was therefore error to instruct the jury, in effect, that Boddie and Vogelsang could not rescind and cancel the lease without the consent of Barrett & Barrett. If the principal is not liable, the guarantor will not be. *Harts v. Fowler*, 51 Ill. App. 612.

It was also error to instruct the jury, as was done by this instruction, that they should find for the plaintiff, unless they should find from the evidence not only that the lease had been canceled by mutual consent of the guarantors and the principals, but that the lessor had “entered into a new and different lease” with another tenant. If appellee and appellant Vogelsang had rescinded and canceled the lease, then it was entirely immaterial, so far as Barrett & Barrett are concerned, whether or not appellee had made a lease to another party.

The second instruction given at the instance of appellee is as follows:

“If the jury believe from the evidence that plaintiff, Boddie, executed a lease to the defendants, Barrett & Barrett and John Z. Vogelsang for the store, No. 128 South Clark street, and thereafter that John Z. Vogelsang sold out his interest in the lease to H. H. McCuen, and placed him in possession of the premises, and that such change of ownership was not accepted by Boddie as an extinguishment of his original lease to Barrett & Barrett and Vogelsang, and that thereafter, without the consent of Boddie, the said McCuen sold out his interest in the premises to one John Mahler, and placed him in possession thereof, and that afterward the said Mahler fell behind in the payment of the rent, and that Boddie, the plaintiff, accepted from him such rent as he paid from time to time, these facts would not release the defendants, Barrett & Barrett and Vogelsang, unless the jury believe from the evidence that Boddie, the plaintiff, intended thereby to release said defendants and to surrender the lease signed by them, and that he did intend to and did accept said Mahler in substitution for the original lessees, the defendants, and made a new lease with him in pursuance of such intention.”

This instruction says to the jury that if they believe from the evidence certain things enumerated in the instruction to be true, yet that the facts thus found by the jury would not release appellants, unless the jury also believe from the evidence that the appellee intended thereby to release them. Such an enumeration of facts in an instruction should ordinarily include a reference to all the facts in evidence bearing upon the point thus presented. There is evidence in this record tending to show that appellee, by his conduct, accepted Mahler as his tenant in such manner as to release appellants. What he did in that regard is a question of fact for the jury, which should have been included in the grouping of facts in this instruction. An instruction should not limit a finding to a part of the facts bearing upon the point presented.

This instruction also says to the jury that if they find the facts as there referred to, the appellants would not be thereby released unless the jury also find that appellee

Arnold v. Kilchman.

intended thereby to release appellants and made a new lease to Mahler in pursuance of such intention. Whether appellants were released by the acts of appellee does not depend solely upon the question of his intention. He may have so acted as to release appellants without having intended to release them. It is not necessary that there be an express agreement to release a lessee. Such an agreement may be inferred from the conduct of the parties. *Fry v. Patridge*, 73 Ill. 51.

But this instruction goes farther and says to the jury that although appellee may have intended by his acts to release appellants, yet that they were not so released unless appellee "made a new lease with him (Mahler) in pursuance of such intention." That is not the law.

Appellee's fourth instruction is also erroneous. One reason therefor is that it assumes that appellants placed Mahler in possession of the premises. The testimony is conclusive that they did not, and did not know of it in advance of its consummation. It also says that appellants assumed to pay the rent. That is not correct. Barrett & Barrett were guarantors only.

These instructions entirely ignore the fact that Barrett & Barrett were only guarantors. There may have been conduct on the part of appellee such as would have released Barrett & Barrett, which would not have operated to release Vogelsang, and there was evidence tending to establish this. But we will refrain from expressing our views further as to the testimony. The errors indicated in the instructions are such that the judgment must be reversed.

The judgment of the Superior Court is reversed and the cause remanded.

Adolph Arnold, Herman Arnold, Theodore Arnold and Benjamin F. Baker v. Albert Kilchman.

1. *APPEALS—Where There is No Judgment.*—Where the record fails to show a judgment against the party appealing the appeal will be dismissed.

Assumpsit, for moneys deposited in a bank. Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict for plaintiff, etc.; appeal by defendants. Heard in the Branch Appellate Court, First District, at the March term, 1898. Appeal dismissed. Opinion filed June 21, 1898.

ESCHENBURG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

WALTHER & LANAGHEN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This appeal must be dismissed for the reason that there is no judgment against appellants. The suit was brought against the four appellants, Adolph Arnold, Theodore Arnold, Herman Arnold and Benjamin F. Baker, together with Gustav A. Bodenschatz and Arthur J. Howe. Upon the trial the jury returned a verdict finding the issues, joined between appellee and appellants, for the appellee, and assessing appellee's damages only against said Bodenschatz and Howe. The damages thus assessed are for the sum of \$532.39. A motion for a new trial, apparently by all of the defendants below, was overruled. Judgment was thereupon entered against the defendants Bodenschatz and Howe, and against them only. This record shows no judgment of any kind against the appellants. Bodenschatz and Howe do not, nor does either one of them, join in this appeal. Although a person be a party defendant to a suit in which a judgment is entered against his co-defendant, he can not appeal when there is no judgment of any kind against him.

This appeal from the Circuit Court will be dismissed.

Adolph Arnold, Herman Arnold, Theodore Arnold and Benjamin F. Baker v. Bertha Seifert.

1. **BANKS AND BANKING—***Notice of Withdrawing Deposits.*—Where moneys are deposited in a bank, the bankers reserving the right to demand sixty days' notice as a condition of payment, a suit brought

Arnold v. Seifert.

without giving such notice is not prematurely brought unless the bank demands the notice.

Assumpsit, for moneys deposited in a bank. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 21, 1898.

STATEMENT.

The declaration in this case consists of the common counts, alleging a joint promise of all the defendants, as copartners, doing business under the firm name of Arnold Bros., Baker & Co. Defendants Howe and Bodenschatz are defaulted, and these appellants filed pleas of non-assumpsit and non-joint liability, duly verified. The plaintiff without objection testified that she deposited with Arnold Bros., Baker & Co. the amount written in ink in a pass-book which she produced and offered in evidence. The entries in this book show a credit to plaintiff of \$720.12, and that the deposits were to draw four per cent interest, compounded semi-annually, and that these deposits were made and received subject to the following, among other conditions, viz.:

“We may allow moneys to be withdrawn or paid on account of savings deposits at any time during business hours. But, because it is necessary to loan out our funds to enable us to pay interest, and as time to get in the same may sometimes be desirable, we therefore reserve the right, and make it a condition on all savings deposits, to demand and have sixty days previous notice in writing as a condition of payment on all sums exceeding one hundred dollars, and thirty days notice on smaller sums, whenever, in our opinion, the same may be deemed advisable; and all savings deposits shall be made and received subject to these conditions.”

The record shows that at the time the bank failed, in August, 1896, appellee “asked” for the money deposited by her, but never received it. This suit was commenced

December 9, 1896. The existence of the partnership between the defendants was shown. The jury returned a verdict for plaintiff for \$751. Appellants moved to set aside the verdict and for a new trial, but their motion was overruled and judgment entered on the verdict. There were no objections or exceptions taken to any of the proceedings prior to the overruling of the said motion, and the only question that can arise on this appeal is the correctness of the action of the court in denying that motion and entering judgment.

ESCHENBURG & WHITFIELD and SAMSON & WILLOX, attorneys for appellants.

HENRY M. COBURN, attorney for appellee.

MR. JUSTICE HORTON, after making the foregoing statement, delivered the opinion of the court.

As counsel for appellants frankly state, the only question in this case is whether the suit was prematurely brought; or, in other words, was the debt due at that time?

The condition as to a demand is set out in full in the foregoing statement. By it the bankers "reserve the right * * * to demand and have sixty days previous notice, in writing * * * whenever, in our (the bankers) opinion the same may be deemed advisable." There is no testimony tending to show that appellants' firm, or any one for it, exercised this reserved right and demanded the specified notice or deemed it advisable so to do. The giving of sixty days notice by the depositor was not a necessary prerequisite or condition of payment unless or until the bank exercised its reserved right to, and did, demand such notice. Not having done so, the claim of appellee was due at any time. This suit was not prematurely brought.

The judgment of the Circuit Court is affirmed.

Dauchy Iron Works v. Toles.

Dauchy Iron Works v. Wilford C. Toles.

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1. **SEALED CONTRACTS**—*Not to be Changed by Parol.*—The terms of an executory contract under seal can not be so changed by parol as to leave a contract to be enforced which rests partly upon the agreement under seal and partly upon agreement by parol.

2. **RELEASE**—*Of Sealed Instrument—May be by Parol.*—But it does not follow that a discharge or release of a condition of a contract under seal may not be effected by parol. On the contrary the well established rule is that such a release may be by parol.

3. **ESTOPPEL**—*To Object to Alteration of Sealed Contract by Parol.*—A person can not complain of the breach of a covenant when such breach has been induced by his own acts or conduct. While this doctrine has been applied mainly in equity, yet cases are not wanting where it has as well been permitted to govern at law and in relation to sealed contracts.

Action for Rent.—Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed May 26, 1898.

STATEMENT.

This suit was begun before a justice of the peace for rent claimed to be due to appellant under the terms of a lease from appellant to appellee. The lease demised certain room in a building, and covenanted to furnish a certain amount of steam power for use in same. It contained a provision that for failure to furnish the steam power, the liability of appellant should be limited to a fixed amount per month. The lease was under seal. The cause was tried in the Circuit Court upon appeal from a judgment of the justice of the peace. It was undisputed that the rent reserved for certain months was unpaid. It was also undisputed that during a number of months no steam power was furnished to appellee. Appellee sought to set off against the rent due a claim for damages for failure to furnish power. There was a conflict in the evidence as to the reason why the power was not furnished. Appellant testified that after the execution of the lease he was told by appellee, in effect, that the power

would not be needed by him for a time, and that appellee was informed that he could have the power when he wanted it, and that it was furnished at all times when requested. Appellee denied that such an arrangement was made. Upon motion of appellee the court ordered all evidence of conversations, relative to any change of the terms of the lease as to furnishing power, to be stricken out. The court instructed the jury, in effect, that if they found from the evidence that there was no power furnished to appellee during any portion of the term in question, then that damages for such failure to furnish power should be allowed appellee as against rent due under the lease. The jury returned a verdict for the defendant, appellee. From judgment upon the verdict this appeal is prosecuted.

LOUIS M. GREELEY, attorney for appellant.

A party can not complain of a breach of contract or a covenant which he has induced by his own acts or representations. *United States v. Peck*, 102 U. S. 64; *Fleming v. Gilbert*, 3 Johns. 527; *Curlee v. Reiger*, 45 Ill. App. 544; *Barton v. Gray*, 57 Mich. 622, 636; *Stearns v. Hall*, 9 Cush. 31, 35; *Longfellow v. Moore*, 102 Ill. 289, 294; *Shaw v. Turnpike Co.*, 2 Pen. & Watts (Penn.), 454, 461; *Spence v. Healy*, note of Judge Hare to Am. Ed., 8 Exch. 668.

This doctrine rests upon the principle of estoppel *in pais*. It is general in its application and applies in cases of covenant as well as in case of an agreement not under seal. *Worrell v. Forsyth*, 141 Ill. 22, 30; *McComb v. McKennon*, 2 Watts & S. 216; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 527; *Friess v. Rider*, 24 N. Y. 367; *Ratcliff v. Pemberton*, 1 Esp. 35.

The rule that a contract under seal can not be changed by a subsequent parol agreement only applies in so far as such parol agreement remains unexecuted. A contract under seal may be modified or changed by an executed parol agreement. *Worrell v. Forsyth*, 141 Ill. 22, 30; *Leavitt v. Stern*, 159 Ill. 532; *Loach v. Farnum*, 90 Ill. 368.

JAMES A. PETERSON, attorney for appellee.

Dauchy Iron Works v. Toles.

Parol evidence is not admissible to vary the terms of a written instrument. *Marshall v. Gridley*, 46 Ill. 247; *Strehl v. D'Evers*, 66 Ill. 77; *Mumford v. Tolman*, 157 Ill. 258.

Evidence of parol agreement and understandings, antecedent to or contemporaneous with, the execution of an instrument under seal is not admissible to vary the terms of the written instrument. *Moran v. Peace*, 72 Ill. App. 135; *Abrams v. Pomeroy*, 13 Ill. 133; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Hume Bros. v. Taylor & Moss*, 63 Ill. 43; *Heisen v. Heisen*, 145 Ill. 658; *Lane v. Allen*, 162 Ill. 426.

An agreement to waive the covenants or conditions of a sealed instrument must be supported by a consideration. *Moran v. Peace*, 72 Ill. App. 135.

MR. JUSTICE SEARS delivered the opinion of the court.

It is apparent that the jury reached their verdict by allowing to appellee damages for failure to furnish steam power according to the covenants of the lease. The jury could have returned no other verdict under the rulings and instructions of the court. The evidence which was stricken out by the court tended to show a waiver of that condition of the lease which provided for the furnishing of steam power during all the term of the tenancy. Counsel for appellee contends that the ruling was proper, because the lease, being under seal, its provisions could not be altered by parol agreement. In other words the contention is that because the conditions of this sealed instrument provided for the furnishing of power throughout the term of the lease, no waiver of such provision could be effected by parol, and whatever the agreement and consent of the parties may have been, yet the very fact that no power was furnished, was conclusive as to the right of appellee to damages for breach of the contract. The rule governing is not so harsh and unreasonable.

It is true, as contended by counsel, that the terms of an executory contract under seal, can not be so changed by parol as to leave a contract to be enforced which rests partly upon the agreement under seal and partly upon agreement.

by parol. But it does not follow that a discharge or release of any condition of a contract under seal may not be effected by parol. On the contrary, the well-established rule is that such a release may be by parol. *White v. Walker*, 31 Ill. 422; *Vroman v. Darrow*, 40 Id. 172; *Moses v. Loomis*, 156 Id. 392.

There is another principle, closely allied to the rule above announced, which would govern. It is that one can not complain of breach of a covenant when such breach has been induced by his own acts or conduct. While this doctrine has been applied mainly in equity, yet cases are not wanting where it has as well been permitted to govern at law and in relation to sealed contracts. 2 *Parsons on Contracts*, 793; *Fisher v. Smith*, 48 Ill. 184; *Moses v. Loomis*, *supra*.

The evidence should not have been stricken out.

The issue as to whether appellee agreed that no power need be furnished until he had occasion to use it, and whether it was at such times furnished, should have been submitted, under proper instructions, to the jury.

The judgment is reversed and the cause remanded.

Illinois Central Railroad Co. v. Joseph Oberhoefer.

1. **ORDINARY CARE**—*Finding Against the Weight of the Evidence.*—A finding that a person suing for personal injuries was, at the time of the accident, in the exercise of ordinary care for his own safety, if clearly against the weight of the evidence, should be set aside.

2. **TRESPASSER**—*Upon Railroad Grounds, When a Passenger is.*—When a passenger leaves a train and proceeds along the track instead of taking a safe exit provided by the company, he becomes a trespasser.

3. **SAME**—*Duty of Railroad Companies.*—A railroad company owes no duty to a trespasser upon its tracks in respect to furnishing flagmen or ringing a bell.

4. **SAME**—*Using Railroad Tracks as Highways.*—Persons who travel upon railroad tracks as highways are themselves guilty of gross negligence, and the railroad company is only responsible for willful or wanton injuries to them, or for injuries resulting from a degree of negligence equivalent thereto.

I. C. R. R. Co. v. Oberhoefer.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed June 29, 1898.

JOHN G. DRENNAN, attorney for appellant; JAMES FENTRESS, of counsel.

JAMES C. MOSHANE, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court. November 12, 1890, about 12:30 at night, appellee, while walking over appellant's railway tracks and right of way, was injured by one of appellant's south-bound suburban trains on which he had just been a passenger and had alighted to go to his home. His injury resulted in the loss of his right leg below the knee. March 5, 1892, appellee, then being twelve days under twenty-one years of age, settled with appellant, and received from it \$150 in full satisfaction of all claims, demands, damages and causes of action against appellant, and released it therefrom.

March 13, 1894, appellee brought suit for the same injury in the Superior Court, where a trial before the court and a jury resulted in a verdict and judgment on May 29, 1897, in his favor, from which this appeal is taken.

The declaration, consisting of five counts, charges in substance that appellee was injured while exercising ordinary care, by reason of appellant's negligence in allowing a certain cinder path or walk provided for passengers to walk upon its right of way in Chicago, leading from 51st street, alongside of and west of its railway tracks to its 50th street station, to be and remain obstructed by stone and other obstructions, so that it could not be traveled upon in safety in the night time, and in neglecting to place lights along said walk on appellant's tracks to enable passengers to go to and from appellant's trains in safety; also in negligently running its train, and in failing to ring a bell or blow the whistle on its engine, or to give any reasonable

warning of the train's approach; that by reason of the negligence of appellant in permitting said path to be obstructed, and neglecting to place lights as aforesaid, appellee, a passenger on appellant's train, when he alighted therefrom to go to his home, could not walk along said path in safety, and was thereby compelled to and did walk along one of appellant's tracks, and while so walking along said track he was so surprised and frightened by the headlight of appellant's train approaching him from behind (being the same train from which he had just alighted) flashing in front of him that he thought the train was approaching upon the track he was then walking on, and in order to escape he jumped from said track to one side upon the track on which the train was running, and thereby got in front of the train; was thereby knocked down and the wheels passed over his right leg, so that it became necessary to amputate it, which was done, and he thereby was otherwise injured, etc. At the close of the plaintiff's evidence, and also at the close of all the evidence, and before the case was submitted to the jury, appellant's counsel asked the court to give a written instruction, then presented, directing the jury to find for defendant, but the court refused to give such instruction, to which refusal appellant's counsel duly excepted. The jury found specially that the servants in charge of the train that injured appellee did not intentionally nor willfully cause the train to injure him; that at the time he was injured he was attempting to walk upon, along or between the tracks of appellant in order to reach 51st street, and that before and at the time of his injury appellee was in the exercise of ordinary care for his own safety.

The evidence, among other things not necessary to be considered in the view we take, shows that appellee had been a passenger on appellant's train that injured him; had paid his fare; that the train was going south from the city on the easterly one of two tracks used by appellant's suburban trains; that it stopped at appellee's station near 50th street and Lake avenue to let off passengers; that the coach on which appellee was riding stopped about 200 feet south

of 50th street; that appellee alighted from the front platform of the coach next to the engine of the train when it stopped, stepped one or two steps westerly from the train, proceeded in a southerly direction on appellant's right of way toward 51st street along the westerly of the two tracks used by appellant's suburban trains, or along the space between the easterly and westerly of said two tracks; passed alongside the engine; when he had gone along the tracks about eighty feet the train, having stopped twenty to twenty-five seconds, started up on its course south; the headlight of the engine flashed in front of appellee as he walked along and surprised and frightened him so that he supposed the train was on the track on which he was walking; he jumped to one side, thinking to avoid the train, but instead jumped in front of the engine, was knocked down and his right leg cut off at the ankle.

The evidence also shows that appellee was a cook at the Hyde Park hotel at 51st street and Lake avenue, just one block and a half from appellant's 50th street station; that he had worked at the hotel six or seven months prior to the injury, and after a visit to New York, had worked at the hotel continuously for the three weeks just prior to the accident; had been in the habit of taking appellant's suburban trains at 50th street station during all the time he had worked at the hotel, and for the three weeks prior to his injury had used its trains, taking them at this point almost daily; that he was entirely familiar with the station, its approaches, the railway tracks and the method and frequency of the running of appellant's trains, and that they only stopped at this station twenty to thirty seconds, and knew that this train would start in a few seconds after he alighted from it; that Lake avenue, a public street, with a sidewalk thereon, runs parallel to appellant's tracks from 50th to 51st street, and 200 feet west from appellant's depot; that the depot was about 100 feet south from 50th street, and there was a passageway eleven and one-half feet wide from Lake avenue to the north end of appellant's depot for the use of persons desiring to take appellant's trains or to leave

them; that at this point (50th street station) appellant had six tracks, the two westerly being for the use of suburban trains, the first on the west for north-bound trains and the second for south-bound trains, the two east of those for through trains, and the remaining two on the east for freight trains; that immediately west of the two suburban tracks and opposite the depot was a platform about 150 feet in length and leading from the south end of this platform along the west side of the westerly track to 51st street was a cinder path or walk three to four feet in width and four or five feet from the west rail, which path was at and prior to the time of appellee's injury habitually used by persons going to appellant's trains from 51st street or leaving the trains to go toward 51st street; that immediately west of the cinder path, extending from the depot south to 51st street and west to appellant's westerly line of its right of way, was unoccupied ground more than twenty-five feet in width, and along the westerly line of the right of way was a stone wall; that 51st street crossed appellant's tracks, and along the north line of 51st street was a wire fence with an opening at the south end of the cinder path through which persons going to or coming from the trains to 51st street passed; that appellant's depot and platform at the time of the accident were lighted by kerosene lamps; there were no lights along the cinder path; the night was dark, and appellee says was "cold and nasty." A clear preponderance of the evidence shows that there was no obstruction in the cinder path which would have prevented appellee from following it. He knew of the passageway to Lake avenue, but says that he went south toward 51st street because that was nearer. He made no attempt to walk along the cinder path where there was no danger, but knowing, as he says, that the train from which he alighted would start in a few seconds, he walked along appellant's tracks where no duty to ring a bell or sound a whistle or give any warning of the movement of its train was due to him from appellant. As we have seen, the jury found that he was not intentionally nor willfully injured, which finding is amply sustained by

the evidence. The engineer of appellant's train did not see appellee on the tracks, nor did any of appellant's servants, nor could they have been expected to anticipate his presence on the tracks. The finding that appellee was in the exercise of ordinary care for his own safety is clearly against the weight of the evidence. If it were conceded that the cinder path was obstructed, appellee, according to his evidence, knew all about it, knew that it was not lighted, and, according to his evidence, knew it was obstructed, and deliberately walked upon the tracks of appellant, which he knew to be a dangerous place, instead of making his exit along the unoccupied grounds to the west of the cinder path or by the passageway at the depot to Lake avenue. Appellant had the right to obstruct the cinder path so long as it provided another safe and commodious exit from its trains, as it did. Appellee was no less a trespasser upon the tracks, even if the cinder path was obstructed and it was not lighted. When he left the train and proceeded along the tracks instead of to a safe exit provided by appellant, he became a trespasser. *Roden v. C. & G. T. Ry. Co.*, 133 Ill. 72, and cases cited; *Wabash R. Co. v. Jones*, 163 Ill. 167; *Ward v. C. & N. W. Ry. Co.*, 165 Ill. 466; *Mathews v. Atlantic & N. C. R. Co.*, 23 S. E. Rep. 177; *C. R. I. & P. Ry. Co. v. Dingman*, 1 Ill. App. 162; *Bancroft v. B. & W. R. Co.*, 97 Mass. 278; *Sturgis v. Detroit, etc., R. Co.*, 72 Mich. 619; *Drake v. Penn. Co.*, 137 Pa. St. 352-9.

In the *Roden* case, *supra*, the court said: "At the time appellant was injured he was traveling longitudinally along the main track of appellant's railway, where trains were passing in each direction. The company owed him, therefore, no duty in respect to furnishing flagmen or ringing a bell, which are for the benefit of those about to cross railroad tracks. *C., R. I. & P. Ry. Co. v. Eninger*, 114 Ill. 79. Those who travel upon railroad tracks as highways, are themselves guilty of gross negligence, and the railroad company is only responsible for willful or wanton injuries to them, or for injuries resulting from a degree of negligence equivalent thereto."

In the Sturgis case, *supra*, the person injured had been a passenger and in leaving the train went upon the railway tracks, which were not lighted, from the depot platform, instead of going by the passageway provided from the depot to the regular highway of the village, and was injured. The court said: "There was no conflict in the evidence that defendant had all necessary platform accommodations, with access to the only highway leading to the town. The only ground urged for the plaintiff was that the railroad track was very generally used as a shorter cut from the village to the depot than was furnished by the regular road. * * * It is impracticable to keep off trespassers from an open track, and all who go upon it do so at their own risk of such dangers as are incident directly to such use. Under all the decisions made in this State on the subject, a company which has provided all reasonable facilities for ingress and egress from its station houses has done its full duty in that regard."

In the Bancroft case, *supra*, the court said: "The defendants had provided a sufficiently convenient and readily accessible place of egress from the platform upon which the intestate stepped upon leaving the train. He could have reached the highway through the passage so provided without going on the track of the railroad. Instead of taking this course he attempted to pass across the track unnecessarily at a moment when he knew that the train he had just left was slowly moving off so as to obstruct his view toward the point from which trains coming from the city approached the station. In consequence of this he did not see the express train by which he was struck in time to extricate himself seasonably to avoid collision with it. The track of a railroad over which frequent trains are passing, is a place of danger. A person who goes upon it unnecessarily or without valid cause voluntarily incurs a risk for the consequences of which he can not hold other persons responsible, certainly not without adequate proof that he took active measures of precaution to guard against accident."

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It seems unnecessary to consider the other contentions of counsel in view of the facts of this case and the law as defined in cases *supra*. Appellee unnecessarily and negligently went into a known place of danger upon appellant's railway tracks, fully known by him to be dangerous, when he knew of and might have taken at least three other ways to reach the street, to-wit, the cinder path, or unobstructed ground west of the path, or the passage at the depot leading to Lake avenue, the latter being provided by appellant for the use of passengers, and therefore failed to exercise ordinary care for his own safety.

Moreover, appellant was guilty of no negligence, having provided a safe and commodious exit from its trains, and the exit which appellee was in the habit of using was not obstructed so as to prevent or make its use unsafe for appellee.

The judgment will be reversed.

John Culver and Mary J. Culver v. William O. Brinkerhoff.

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1. **PRACTICE—Setting Aside Defaults.**—When the proceedings of the court in ordering a default has been regular, upon a motion to set the default aside, the court may properly require the defendant to show that he has a meritorious defense.

Motion, to set aside a default. Heard in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Hearing and motion denied, error, etc. Heard in this court at the March term, 1898. Affirmed. Opinion filed July 21, 1898.

MORTON CULVER, attorney for plaintiffs in error.

G. FRANK WHITE, attorney for defendant in error.

MR. JUSTICE SEARS delivered the opinion of the court.

Defendant in error filed his bill to foreclose a mortgage executed by plaintiffs in error. A demurrer to the bill

was filed by plaintiffs in error. On October 4, 1897, while the suit was pending upon bill and demurrer, a notice was left at the office of the solicitor of plaintiffs in error, to the effect that on the following day, viz., October 5, 1897, or as soon thereafter as counsel could be heard, the solicitor for defendant in error would call up the demurrer for disposal. On October 11, 1897, the demurrer was overruled and plaintiffs in error were ruled to answer in five days. For failure to answer according to this rule, plaintiffs in error were afterward defaulted. On October 30, 1897, the cause was referred to a master. Master's report was filed, and on November 24, 1897, a final decree granting the relief prayed in the bill of complaint was entered.

Plaintiffs in error did not appear at any of these several proceedings, except at entering of decree. On November 30, 1897, a motion was entered by plaintiffs in error to set aside the decree. Upon the hearing of this motion affidavits were presented in support thereof. The motion was overruled.

It is complained that the court erred in disposing of the demurrer upon October 11th, because no sufficient notice had been given plaintiffs in error, and that the motion to set aside the decree should have been allowed upon a showing made in affidavits filed by plaintiffs in error. But no affidavit was presented with the motion to vacate, showing a meritorious defense. This court has held that, when through inadvertence a default is irregularly entered after an appearance and before the time for filing an answer has expired, such mistake by the court should be corrected, upon discovery thereof and motion, without requiring the defendant to disclose his defense. *Taylor v. Coghlan*, 73 Ill. App. 378.

But here the proceeding of the court, for all that appears of record, may have been regular. The motion was not disposed of at the day named in the notice, but on Monday of the week following. It is true that the notice was insufficient to entitle defendant in error to have the matter disposed of on October 5th, but it was not heard upon that day. On the contrary, it was placed upon the call for

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Monday of the succeeding week, and so announced in the Law Bulletin. If the solicitor for plaintiffs in error had knowledge of this action of the court, it could not be claimed that the hearing was improper for lack of notice. It is only by the showing made by plaintiffs in error that the propriety of the hearing at that time is questioned. Upon the making of that showing, the court could properly require, as a part thereof, the disclosure of a meritorious defense. *Constantine v. Wells*, 83 Ill. 192.

No such showing of a defense was made. The motion to vacate was therefore properly overruled.

It is also urged that the decree is for an excessive amount, in that it includes the amount of \$47.31 paid for taxes, and \$64.35 paid for special assessments on July 23, 1897, after commencement of suit; and includes \$48 paid for insurance before suit was commenced, and also \$100 as solicitor's fees, to be paid to solicitor for the complainant in the suit. The bill alleges that taxes of 1896, which are the taxes in question, were due and unpaid at time of bringing suit, and that orator will be obliged to pay them to protect property from tax sale. We think this a sufficient allegation. The bill also sets out a covenant of the mortgagors to keep premises insured, and alleges that they failed so to do, and that orator was obliged to pay on July 7, 1897, the sum of \$48 for insurance in order to protect the property. The proof sustains these several allegations. It is provided by the terms of the mortgage that in case of foreclosure the sum of \$100 shall be allowed as solicitors' fees and included in any decree, etc. That the amount is reasonable is shown by the evidence.

The decree is affirmed.

Nicholas Schlee v. Joseph Guckenheimer.

1. GAMBLING CONTRACTS—*Made in This State.*—A contract void under Section 130 of the Criminal Code (Hurd's Statutes, 1898, 571), although made in another State and valid where made, will not be enforced by the courts of this State.

2. **LEX LOCI CONTRACTUS**—*Exceptions to the Rule.*—While it is true, however, that one State or Nation will recognize and execute the laws of another, through comity, yet the principle of comity does not permit the enforcement of foreign laws which are prejudicial to the interests of the State where they are sought to be enforced.

3. **CONTRACTS**—*Made in Another State—When Not Enforceable Here.*—A contract made in one State will not be enforced in another, when to do so would contravene the law of the latter State, or would be against the express prohibition of its laws.

4. **COMITY**—*Between Different States—What it Requires.*—Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State.

5. **SAME**—*Contracts Injurious to the Welfare of the People.*—No State is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws.

Assumpsit.—Option contract. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Judgment for defendant on demurrer to declaration. Plaintiff appeals. Heard in this court at the March term, 1898. Affirmed. Opinion filed July 21, 1898.

JOHN S. COOK and H. T. HELM, attorneys for appellant.

The contract sued upon was made and to be performed in the State of Ohio and was valid there. The contract was a valid common law contract. *Schneider et al. v. Turner*, 130 Ill. 28.

On a common law question the courts of one State will assume that the common law is in force in a sister State. *Crouch v. Hall*, 15 Ill. 263, and cases cited.

It is averred in the count, and admitted by the demurrer that the "contract was a legal and a binding contract in the State of Ohio, where the same was entered into and where the same was to be executed."

Being a legal and binding contract in the State where made and where it was to be performed, the courts of the State will, upon the principle of interstate comity, enforce the "*lex loci contractus*." *Bradshaw v. Newman*, Beecher's Breese, 133; *Stacy v. Baker*, 1 Scam. (Ill.) 417; *Sherman v. Gassett*, 4 Gil. (Ill.) 521; *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365; *Woodward v. Brooks*, 128 Ill. 222; *Cox v. United States*, 6 Peters (U. S.), 172; *Duncan's Heirs v. United States*, 7 Peters (U. S.), 435.

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And this even if the contract sought to be enforced would, if executed or to be performed within the jurisdiction of the *lex fori*, be illegal and void and subject the makers to a penalty. 8 Am. & Eng. Ency. of Law, 1020; Hone v. Ammons, 14 Ill. 29; Phinney v. Baldwin, 16 Ill. 108; McAllister v. Smith, 17 Ill. 328; Roundtree v. Baker, 52 Ill. 241; Mumford v. Canty, 50 Ill. 370; Evans v. Anderson, 78 Ill. 558; Guignon v. Union Tr. Co., 156 Ill. 135; Nixon v. Halley, 78 Ill. 611; Kentucky v. Bassford, 6 Hill, 526; Thatcher v. Morris, 11 N. Y. 137; McIntyre v. Parks, 3 Met. 207; Commonwealth v. Aves, 18 Pick. 215; Greenwood v. Curtis, 6 Mass. 358; Hill v. Spear, 50 N. H. 253; Fuller v. Leet, 59 N. H. 163; Smith v. Brown, 2 Salk, 666; Hawley v. Bibb, 69 Ala. 52; Hubbard v. Sayre, 105 Ala. 440; Peet & Co. v. Hatcher, 112 Ala. 514; Case v. Riker, 10 Vt. 482; Hatch v. Hanson, 46 Mo. App. 323; Kling v. Fries, 33 Mich. 275; Roethke v. Phil Best Br. Co., Ib. 340; Webber v. Donnally, Ib. 468; Woodsen v. Owens, 12 So. Rep. 207; McKee v. Jones, 67 Miss. 405; Wood v. Wheeler, 111 N. C. 231; Atlantic Phos. Co. v. Ely, 82 Ga. 438; Sondheim v. Gilbert, 117 Ind. 71.

DUPÉE, JUDAH, WILLARD & WOLF, attorneys for appellee, contended that under Section 130 of the Criminal Code (Hurd's Statutes 1898, 571), whoever contracts to have or give to himself or another the option to sell or buy at a future time, any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than \$10, nor more than \$1,000; or confined in the county jail not exceeding one year, or both, and that all the contracts made in violation of this section, are to be considered gambling contracts, and are void.

And that the contract although valid in the State where made can not be enforced in this State.

The general rule is, that the validity of a contract is to be governed by the law of the place where it is made. Phinney v. Baldwin, 16 Ill. 108; Mumford v. Canty, 50 Id. 370. And in the application of this principle to notes, it is held that the laws of the State where a note is made, will govern

as to the defense, which can be set up as against the recovery thereon. *Evans v. Anderson*, 78 Ill. 558; *Anstedt v. Sutter*, 30 Id. 164; *Yeatman v. Cullen*, 5 Blackf. 240; *Trimbey v. Vignier*, 1 Bing. New Cases, 151; *Woodruff v. Hill*, 116 Mass. 310.

While it is true, however, that one State or Nation will recognize and execute the laws of another through comity, yet the principle of comity does not permit the enforcement of foreign laws which are prejudicial to the interests of the State where they are sought to be enforced. A contract made in one State will not be enforced in another, when, to do so, would be to contravene the criminal laws of the latter State, or would be against the express prohibition of its laws. Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No State is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws. *Mumford v. Canty*, *supra*; *Story on Conflict of Laws*, Section 327; *Faulkner v. Hyman*, 142 Mass. 53; *Hill v. Spear*, 50 N. H. 253; *Fisher v. Lord*, 63 Id. 514.

In *Chapin v. Drake*, 57 Ill. 295, a draft assigned in payment of a gambling debt, was held void in the hands of a subsequent *bona fide* holder. In *Tenney v. Foote*, 4 Brad. (Ill.) 594, it was held that the notes described in section 131 of the Criminal Code, included notes, the consideration of which, in whole or in part, arose out of the gambling transactions mentioned in section 130; and that a note, given for such differences as are hereinbefore described, was void under section 131. The opinion of the Appellate Court in *Tenney v. Foote*, *supra*, was approved by this court in *Tenney v. Foote*, 95 Ill. 99; and the latter case has been since approved in *Pearce v. Foote*, 113 Ill. 228; see also, *Cothran v. Ellis*, 125 Ill. 496; *Soby v. The People*, 134 Id. 66.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The appellant sued appellee and his partner, William J. Meek, since deceased, on the following contract:

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“COLUMBUS, O., September 12, 1887.

Sold

N. Schlee five cars of sample B barley at 62c a bushel, delivered Columbus, and five cars of sample C barley at 57c a bushel, delivered Columbus. Shipments October 10th and 15th. Terms cash. After these five sample cars of each grade have been received, weighed and examined and found satisfactory, Mr. Schlee has the privilege to order 10,000 bushels more of each grade same price, any time to December 31, 1887.

If the freight rate is less than 12c a hundred any time between Chicago and Columbus, Mr. Schlee to have the benefit of same. Cars to be loaded not less than 800 bushels.

I. BLUMENTHAL,
for MEEK & GUCKENHEIMER,
604 Rialto Building, Chicago, Ill.”

The contract was made at Columbus, Ohio. It is averred in the declaration that the defendants, Meek and Guckenheimer, delivered to the plaintiff, and the plaintiff paid, in accordance with the contract, for the ten cars of barley above mentioned as “Sample B” and “Sample C.” The breach alleged is, that although the plaintiff, November 15, 1887, and afterward, November 27, 1887, ordered and requested the defendants to deliver to him 20,000 bushels of barley, as by said contract they had agreed to do, the plaintiff being able, ready and willing to accept and pay for the barley, the defendants neglected and refused to deliver the same. The declaration contains two special counts on the contract, the first being against both defendants, and the second being an additional count against appellee alone, Meek, appellee’s partner, having died after the filing of the first count.

Appellee demurred to the declaration, assigning, as special cause of demurrer, that the contract was in violation of section 130 of the Criminal Code. The court sustained the demurrer and gave judgment for appellee.

Section 130 of “An act to revise the law in relation to criminal jurisprudence,” in force July 1, 1874, is as follows:

“Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.”

By section 131 a note given on account of any such transaction as is mentioned in section 130 is void. *Tenney v. Foote*, 4 Brad. 594; approved on appeal, 95 Ill. 99; and also in *Pope v. Hanke*, 155 Ib. 617.

By section 136 it is provided that no assignment of any such note shall cut off the defense of illegality. The contract, if made in this State, would be clearly illegal, and no recovery could be made on it (*Schneider v. Turner et al.* 130 Ill. 28), and counsel for appellant do not contend the contrary.

It is averred in the declaration that the contract was legal and binding between the parties in the State of Ohio. Independently of this allegation, it will be presumed that the common law prevails in the State of Ohio (*Crouch v. Hall*, 15 Ill. 263), and as by the common law such contracts are valid (*Schneider et al. v. Turner*, 130 Ill. 28), appellant's counsel contend that the *lex loci contractus* must control, and that the contract will be enforced in this State. Appellant's counsel have made an elaborate and able argument in support of this contention, citing numerous authorities, but we think the decision in *Pope v. Hanke*, 155 Ill. 617, decisive as against appellant's contention, and feel bound by the decision in that case. In *Pope v. Hanke* the suit was on a note by an indorsee before maturity for a valuable consideration, and without notice of any illegality in the transaction out of which the note arose. In other words, the plaintiff was a *bona fide* purchaser of the note, before its maturity, for a valuable con-

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sideration. The note was given to settle differences arising out of gambling transactions, and was made by one of the parties engaged in such transaction to the other, and was by the payee indorsed to the plaintiff. Although by the law of Missouri the transactions out of which the note arose were illegal and such that neither party to the transaction could recover against the other on account of differences or balances in his favor, yet, by the law of Missouri, a note given for such differences would not be invalid in the hands of a *bona fide* purchaser of the note for a valuable consideration, before maturity, and the Supreme Court, in its opinion, concede that such was the law of Missouri, and that the plaintiff could recover on the note in that State. Nevertheless, the court, while recognizing the general rule that the validity of a contract is to be governed by the law of the place where it is made, held that there could be no recovery on the note in this State, saying: "While it is true, however, that one State or Nation will recognize and execute the laws of another through comity, yet the principle of comity does not permit the enforcement of foreign laws which are prejudicial to the interests of the State where they are sought to be enforced. A contract made in one State will not be enforced in another when to do so would contravene the law of the latter State, or would be against the express prohibition of the laws. Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No State is bound to recognize or enforce contracts which are injurious to the welfare of the people, or which are in violation of its own laws," citing authorities. We can not distinguish any difference in principle between the case cited and the present case. The judgment will be affirmed.

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Saratoga European Hotel and Restaurant Co., J. K. Sebree, Hannah M. Spofford and Lucy M. Mills v. Solomon M. Mossler and Morris Mossler.

1. **CERTIFICATE OF EVIDENCE—***When Made Solely upon the Personal Recollection of the Judge.*—A certificate of evidence made only and solely upon the personal recollection of the judge as to what occurred at a prior term, will not be considered as a part of the record by a reviewing court, when objected to in apt time by one of the parties to the suit.

2. **INTERLOCUTORY ORDER—***Where an Interlocutory Order Granting an Injunction is Final.*—An interlocutory order granting an injunction is an order from which no appeal lies except by virtue of the statute. But if there is no change in such order by the court, and it is appealed from, then, as to such appeal, it is to be treated as a final order; and it can not, for the purpose of such appeal, be explained or affected by a certificate of evidence made at a subsequent term of the court.

8. **INJUNCTIONS—***When to Issue Without Notice.*—It is not necessary that the facts showing that the rights of a party complainant will be unduly prejudiced, unless an injunction is issued without notice, should appear in the affidavit. It is sufficient if such facts appear in a properly verified bill.

4. **SAME—***Sufficiency of Bill for Injunction Without Notice.*—The court recites in the opinion and holds sufficient the allegations of a bill for the issuing of an injunction without notice.

5. **MERCANTILE SHOW WINDOWS—***Doctrine of Ancient Lights.*—There is something more than light involved in the case of mercantile show windows in large cities. Courts recognize the fact that such windows are a very large element in the renting value of business places.

Interlocutory Order Granting an Injunction.—Made by the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Appeal by defendant. Heard in the Branch Appellate Court, First District, at the March term, 1898. Affirmed. Opinion filed June 31, 1898.

FLOWER, SMITH & MUSGRAVE, attorneys for appellants.

PAM, DONNELLY & GLENNON, attorneys for appellees.

MR. JUSTICE HORTON delivered the opinion of the court. This cause is now before this court on an appeal from an

interlocutory order granting an injunction restraining the appellants.

We must first consider the motion of appellees to strike from the transcript of record the certificate of evidence. The reasons assigned in support of said motion are that said certificate was made at the March term, 1898, of said court, and related to an order entered at the February term; that the judge signing said certificate had no authority so to do; and that said certificate is made solely and entirely upon the personal recollection of the judge who signed it.

March 3, 1898, the bill in this case was verified and filed. Indorsed thereon is the usual statement by a master recommending that an injunction issue; also a direction in the usual form, signed by Judge Chetlain, that the writ issue.

The certificate of evidence recites that application was made to Judge Chetlain at his house, and not in the court house, between eight and ten o'clock P. M., "March 3, 1898, of the February term," for an injunction restraining defendants as prayed in said bill, which application was then and there granted without notice to defendants. Said certificate of evidence was presented to and signed by said judge March 7, 1898, which was of the March term of said court. Complainants (appellees) objected to the court signing said certificate, and the same was "signed, ordered and sealed only and solely upon the personal recollection" of said judge, against the objection of appellees then and there made. There was no consent of counsel or order by the court at the February term that such certificate might be prepared later.

A certificate of evidence made "only and solely upon the personal recollection" of the judge as to what occurred at a prior term, will not be considered as a part of the record by a reviewing court, when objected to in apt time by one of the parties to the suit. *Wabash, P. & St. L. Ry. Co. v. People*, 106 Ill. 652; *Harris v. People*, 138 Ill. 63.

It is urged in reply that the cases cited by appellees are at common law, and that interlocutory orders in chancery are, "in the breast of the court," subject to modification or

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reversal at any time before final decree, and that therefore the rule laid down in common law cases does not apply. The record does not show any action by the court below upon any motion to modify or reverse the order granting said injunction. The only purpose or office of said certificate of evidence is to state and make a part of the record what is said to have occurred at a previous term. When presented for such purpose it makes no difference whether it be chancery or common law.

But there is another reason why this motion must be sustained. "March 3d, A. D. 1898, the same being one of the days of the February term of said court," an order was regularly entered in said court, directing that an injunction issue in said cause, and stating fully just what defendants be restrained from doing. It does not appear from the record which judge of the Superior Court entered that order, nor that there is any connection between said order and the recommendation by the master or the indorsement by the judge upon the bill. It was "in the breast of the court" to have modified or vacated said order, but it has not done so. The certificate of evidence makes no reference to and in no way affects that order. Suppose it to be true that at his private residence, between eight and ten o'clock in the evening, and without notice to defendants below, Judge Chetlain signed the order indorsed on the bill filed in this case (and that must be treated as a nullity), there still remains the order of the Superior Court, duly entered of record, that the injunction issue in the language in which it was in fact issued.

The order granting an injunction is an interlocutory order. From it no appeal lies except by virtue of the statute. If there be no change in such order by the court where it was entered, and it be appealed from, then, as to such appeal, it is to be treated and considered as a final order. It can not, for the purpose of such appeal, be explained or affected by a certificate of evidence made at a subsequent term, any more or any further than any other final order can be.

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It is also argued by appellants that the injunction in question was improperly issued without notice, there being no facts stated in the affidavit to justify such action. It is not necessary that the facts showing that "the rights of the complainant will be unduly prejudiced," unless the injunction issue without notice, should appear in affidavit. It is sufficient if such facts appear in a properly verified bill. The statute is that such facts "shall appear from the bill *or* affidavit accompanying the same. "Such is also the opinion of the court in *Suburban Co. v. Naugle*, 70 Ill. App. 384, 398.

It appears from the verified bill upon which the injunction complained of was granted, that, against the protest and objection of appellees, appellants had commenced the erection of a canopy in such manner that it "very largely and materially covers the front of the premises so leased and occupied by your orators, and particularly the show window in said premises, * * * and extends the entire height of the storeroom and show window of your orators' said premises * * * and extends to the end of the sidewalk in front of said premises."

The following statement also appears in said bill:

"Your orators further show and represent unto your honors that the said defendants will construct and complete the construction of the said building of said canopy and covering, upon the premises of your orators, extending over and upon the said Madison street to the end of the sidewalk as hereinabove set forth, and thereby absolutely destroy and make valueless and injurious to your orators the said premises so rented and leased by them and now by them occupied; that their light in and about the premises occupied by them will be seriously impaired and interfered with and shut out; that the means of going to and from their premises will be more or less impaired, retarded and interfered with by the construction of the said canopy and covering as herein set forth; that the means of having the wares and merchandise of your orators in their show window in their said premises observed, seen and used, as is their right and enjoyment of their said premises, will be materially, largely

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and injuriously interfered with, impeded and retarded, and that the construction and building of the said canopy and covering should be enjoined and restrained *pendente lite*, and such injunction and restraining order made perpetual upon a final hearing of this bill of complaint."

It is also stated in said bill that the appellants (defendants below), "contrary to the opposition and objection of these complainants, and without their consent, surreptitiously in the night time, and between the hours of eleven o'clock at night on said February 26, A. D. 1898, and Sunday, February 27, A. D. 1898, caused the entire west part of their show window in their said premises to be covered with a wooden partition or frame work extending the entire height of your orators' said show window."

Upon such statements of fact the court below was justified in entering said order for an injunction without notice.

The appellants, Spofford & Mills, are the owners of a large building situated at the southeast corner of Madison and Clark streets in the city of Chicago. Near the center of the north or Madison street front of said building is what is called a ladies' entrance to a hotel in said building. The door is some eight or ten feet back from the front or street line. East of and adjoining the ladies' entrance are the premises leased and occupied by appellees, having a frontage of eighteen feet on Madison street. Between the entrance to the store of appellees and said ladies' entrance is a "show window" forming a part of appellees' premises. What would be the "corner" of that show window if the west and north fronts thereof were continued until they intersected is "cut off," so that there is a diagonal face or front of two and a half feet. Said show window has a Madison street frontage of seven and a half feet, the diagonal frontage two and a half feet, and a west frontage or face of seven feet. The west face of said show window is the east line of said ladies' entrance.

After the defendants, Spofford & Mills, had leased the store to appellees, they leased to the defendants Sebree and the Hotel Company the portion of said building used as a

hotel, including the ladies' entrance thereto. The exact date of said leases are not in the record. February 26, 1898, appellants moved the door to said ladies' entrance toward the street seven feet, and erected a solid oak partition in front of and so that the entire west face or frontage of said show window was covered from view. Following that they commenced the erection of the canopy hereinbefore referred to, which covered the entire diagonal face of said show window. If appellants had a right so to do, the injunction should be dissolved; if not, it should be continued.

On behalf of appellants it is urged that as appellees do not show that they have in their lease any covenant as to the west face of said show window, or as to the use to which the space at the west thereof should be put, they have no cause of complaint in law.

It seems to us that this position is untenable. The only case cited to support it is *Keating v. Springer*, 146 Ill. 481. That case, in so far as it is claimed to be applicable to the case at bar, is a discussion as to "a prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights." It is there held that such English doctrine does not prevail in the majority of the American States.

But that is not the only question in the case at bar. There is something more than light involved in the case of mercantile show windows in our large cities. Courts must recognize the fact that show windows are a very large element in the renting value of many business places. In some instances large sums of money are expended to improve such windows, when the admission of light is not affected thereby. It is not a question of "mere convenience."

As the facts appear at this stage of this case, appellants have no greater rights in said ladies' entrance, no more right to barricade appellees' show window than the common lessors would have, if the lease to appellees had not been made. The show window in question is a very large one in proportion to the size of the store. That window

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has a display front or face of seventeen feet, while the whole store has a width of only eighteen feet and a depth of only forty feet. To hold that such a window and its uninterrupted use has no value to such a store, except for the admission of light, would be to do violence to our every sense of justice.

We are thoroughly impressed with the conviction that no court would ever hold that the lessors, after leasing said store to appellees, should be permitted to destroy or greatly reduce its value to the lessees, and they have no redress or protection.

The motion to strike from the transcript of record the certificate of evidence is granted. The interlocutory order of the Superior Court, entered March 3, 1898, directing that an injunction issue *pendente lite*, is affirmed.

Motion granted and injunction affirmed.

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